TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, ~~1957~~ 1958

No. ~~910~~ 46

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 9, 1958
CERTIORARI GRANTED MAY 19, 1958

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 910

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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[fol. 1]

IN UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

APPENDIX "B" TO BRIEF OF PETITIONER—
Filed September 7, 1957

[fol. 2]

IN THE TAX COURT OF THE UNITED STATES

Docket No. 55694

JAMES E. PEURIFOY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1954

Dec. 23—Petition received and filed. Taxpayer notified. Fee paid.

Dec. 27—Copy of petition served on General Counsel.

1955

Feb. 1—Answer filed by General Counsel.

Feb. 1—Request for hearing in Greensboro filed by General Counsel.

Feb. 4—Notice issued placing proceeding on Greensboro calendar. Service of answer and request made.

Aug. 23—Hearing set December 5, 1955, Winston-Salem.

Oct. 31—Notice changing hearing place to Greensboro, N. C., Dec. 5, 1955.

Nov. 7—Motion to consolidate with dockets 56074 and 56262 filed by petitioner. 11/8/55, granted.

Dec. 7, 8—Hearing had before Judge Atkins on merits. Record held open 30 days to receive a further stipulation of the parties. Stipulation of Facts filed. Briefs, 2/6/56; replies, 3/7/56.

Dec. 22—Transcript of Hearing 12/7/55 filed.

Dec. 22—Transcript of Hearing 12/7/55 filed.

[fol. 3]

1956

Mar. 2—Motion for extension of time to May 8, 1956 to file brief and to June 7, 1956 to file reply brief filed by petitioner.

Mar. 5—Above motion is granted.

May 8—Brief filed by petitioner. Copy served 5/29/56.

May 8—Motion for extension of time to 6/7/56 to file brief filed by respondent. 5/9/56, granted.

May 25—Brief filed by respondent. Copy served 5/29/56.

Jul. 9—Reply brief filed by petitioner. 7/9/56, served.

Oct. 31—Findings of fact and opinion filed. Atkins J. Decision will be entered under Rule 50. Served 11/1/56.

1957

Jan. 3—Agreed computation filed.

Jan. 8—Decision entered, Judge Pierce, Div. 2. Served 1/8/57.

Apr. 5—Petition for review by U. S. Court of Appeals, Fourth Circuit, filed by respondent.

1957

Apr. 5—Notice of filing petition for review sent to Daniel R. Dixon, Esq., filed.

Apr. 9—Proof of service of petition for review filed. (Counsel)

Apr. 17—Notice of filing petition for review with proof of service thereon filed. (James E. Peurifoy)

May 7—Motion for extension of time for filing record on review and docketing petition for review to July 3, 1957 filed by respondent.

[fol. 4]

May 8—Order extending time for filing record on review and docketing petition for review to July 3, 1957, entered. Served 5/10/57.

Jun. 13—Statement of Points with proof of service thereon filed.

Jun. 13—Designation of Contents of Record on Review with proof of service thereon filed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 56074

PAUL V. STINES and BETTY O. STINES, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1955

Jan. 24—Petition received and filed. Taxpayer notified. Fee paid.

Jan. 26—Copy of petition served on General Counsel.

1955

Mar. 25—Answer filed by General Counsel.

Mar. 25—Request for Hearing in Greensboro, N. C. filed by General Counsel.

Mar. 30—Notice issued placing proceeding on Greensboro calendar. Service of answer and request made.

Aug. 23—Hearing set December 5, 1956, Winston-Salem, N. C.

Sep. 30—Motion for leave to file amended petition, amended petition lodged, filed by taxpayer. 9/30/55, granted.

Oct. 3—Copy of motion and amended petition served on General Counsel.

Oct. 17—Answer to amended petition filed by respondent.

[fol. 5]

Oct. 31—Notice changing place of hearing to Greensboro, N. C., Dec. 5, 1955.

Nov. 7—Motion to consolidate with dockets 55694 and 56262 filed by petitioner. 11/8/55, granted.

Dec. 7, 8—Hearing had before Judge Atkins on merits. Record to be held open 30 days to receive further stipulation by parties. Stipulation of Facts filed. Briefs, Feb. 6, 1956; replies, Mar. 7, 1956.

Dec. 22—Transcript of Hearing 12/7/55 filed.

Dec. 22—Transcript of Hearing 12/8/55 filed.

1956

Mar. 2—Motion for extension of time to May 8, 1956 to file brief and to June 7, 1956 to file reply brief, filed by petitioner, 3/5/56, granted.

May 8—Motion for extension of time to 6/7/56 to file brief filed by respondent. 5/9/56, granted.

May 8—Brief filed by petitioner. Copy served 5/29/56.

1956

May 25—Brief filed by respondent. Copy served 5/29/56.

Jul. 9—Reply brief filed by petitioner. 7/9/56, served.

Oct. 31—Findings of Fact and Opinion filed. Atkins J. Decision will be entered under Rule 50. Served 11/1/56.

Jan. 3—Agreed Computation filed.

Jan. 8—Decision entered, Judge Pierce, Div. 2. Served 1/8/57.

[fol. 6]

Apr. 5—Petition for review by U. S. Court of Appeals, Fourth Circuit, filed by respondent.

Apr. 5—Notice of filing petition for review sent to Daniel R. Dixon, Esq. filed.

Apr. 9—Proof of service of petition for review filed. (Counsel)

Apr. 17—Notice of filing petition for review with proof of service thereon, to Paul V. Stines and Betty O. Stines, filed.

May 7—Motion for extension of time for filing record on review and docketing petition for review to July 3, 1957, filed by respondent.

May 8—Order extending time to July 3, 1957 to file record and docket petition for review entered. Served 5/10/57.

Jun. 13—Statement of Points with proof of service thereon filed.

Jun. 13—Designation of Contents of Record on review with proof of service thereon filed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 56262

JOHN S. HALL and DORIS D. HALL, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DOCKET ENTRIES

1955

Feb. 9—Petition received and filed. Taxpayer notified. Fee paid.

Feb. 9—Copy of petition served on General Counsel.

Apr. 5—Answer filed by General Counsel.

Apr. 5—Request for Hearing in Greensboro, N. C. filed by General Counsel.

[fol. 7]

Apr. 7—Notice issued placing proceeding on Greensboro, N. C. calendar. Service of answer and request made.

Aug. 23—Hearing set Dec. 5, 1955, Winston-Salem, N. C.

Oct. 31—Notice changing place of hearing to Greensboro, N. C., Dec. 5, 1955.

Nov. 7—Motion to consolidate with dockets 55694 and 56074 filed by petitioner. 11/8/55, granted.

Dec. 7, 8—Hearing had before Judge Atkins on merits. Record held open 30 days to receive further stipulation of the parties. Stipulation of Facts filed. Briefs, 2/6/56; replies, 3/7/56.

Dec. 22—Transcript of Hearing 12/7/55 filed.

Dec. 22—Transcript of Hearing 12/8/55 filed.

1956

Mar. 2—Motion for extension of time to May 8, 1956 to file brief and to June 7, 1956 to file reply brief filed by petitioner.

1956

Mar. 5—Above motion is granted.

May 8—Brief filed by petitioner. Copy served 5/29/56.

May 8—Motion for extension of time to 6/7/56 to file brief filed by respondent. 5/9/56, granted.

May 25—Brief filed by respondent. Copy served 5/29/56.

Jul. 9—Reply brief filed by petitioner. 7/9/56, copy served.

Oct. 31—Findings of fact and opinion filed. Atkins, J. Decision will be entered under Rule 50. Served 11/1/56.

[fol. 8]

1957

Jan. 3—Agreed computation filed.

Jan. 8—Decision entered, Judge Pierce, Div. 2. Served 1/8/57.

Apr. 5—Petition for Review filed by U. S. Court of Appeals, Fourth Circuit, filed by respondent.

Apr. 5—Notice of filing petition for review sent to Daniel R. Dixon, Esq. filed.

Apr. 9—Proof of service of petition for review filed (Counsel.)

Apr. 15—Notice of filing petition for review with proof of service thereon sent to John S. and Doris D. Hall filed.

May 7—Motion for extension of time for filing record on review and docketing petition for review to July 3, 1957, filed by respondent.

May 8—Order extending time to July 3, 1957, to file record on review and docket petition for review entered. Served 5/10/57.

Jun. 13—Statement of Points with proof of service thereon filed.

Jun. 13—Designation of Contents of Record with proof of service thereon filed.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 55694

JAMES E. PEURIFOY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named petitioner, [fol. 9] by their respective undersigned attorneys, that for the purpose of this proceeding only, the following facts shall be taken as true and correct; provided, however, that this stipulation does not waive the right of either party to introduce other or additional evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any of such facts on the grounds of immateriality or irrelevancy.

(1) That petitioner, James E. Peurifoy, is an unmarried individual and was unmarried during the entire year 1953; that for the taxable year 1953 petitioner filed an individual Federal income tax return (Form 1040), a photostat copy of which is attached hereto as joint Exhibit 1-A, with the District Director of Internal Revenue for the District of North Carolina;

(2) That during the entire year of 1953, petitioner maintained a residence at Kure Beach, North Carolina; that said residence was personally constructed by petitioner and is owned by him free and clear of all debt; that he physically resides in said residence at all times he is employed in the vicinity of Wilmington, North Carolina, and returns to said residence on weekends if the place of employment is within a reasonable distance of said residence;

(3) That petitioner is a pipe welder by trade; that he is a member of the trade union known as the United Asso-

ciation of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the Union); that he is a member of Local No. 329 with headquarters of said ~~local~~ in Wilmington, North Carolina;

(4) That petitioner obtains employment through his Union; that his local sends him to job sites by means of [fol. 10] a "referral card"; that this referral card is presented to a "job steward" at the work site who is a Union member; that the job steward then takes him to the job superintendent who represents the employer and by so doing "clears" him as a duly qualified Union member; that he is actually hired by the job superintendent;

(5) That the job superintendent has some discretion in hiring men, in that he can refuse to hire certain persons for cause, but must eventually hire from men "sponsored" by the Union;

(6) There is no paragraph (6).

(7) That petitioner joined the Union on August 13, 1951; that since said date he has been employed as follows:

(a) That he was first employed by The Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina; that he worked on this project from on or about August 13, 1951 until on or about March 10, 1952;

(b) That he was next employed by The Grinnell Company of Charlotte, North Carolina, to work on the Dupont plant at Kinston, North Carolina; that he worked on this project from March 10, 1952 until November 20, 1953; that while so employed he roomed and boarded with a Mr. and Mrs. George McArthur and that during the period January 1, 1953 through November 20, 1953 he expended for room and board the sum of $496.00; that the distance from his home in Kure Beach to the boarding house near Kinston, North Carolina, is approximately 122 miles; that it is necessary to go through Wilmington en route to Kinston and that the distance from Kure Beach to Wilmington is [fol. 11] approximately 20 miles; that the distance from

the George McArthur boarding house to the Dupont plant is approximately 1 mile; that he drove his car from his boarding house each work day to the job site and back, and that he drove from his boarding house to his residence in Kure Beach each weekend;

(c) That he was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Carolina Power and Light Company plant at Mount Misery, North Carolina, situated about 7 miles from Wilmington, North Carolina; that he worked on this project from November 30, 1953 through May 14, 1955; that while he worked on this project he resided in his residence at Kure Beach, North Carolina;

(d) That he was next employed by The A. L. Wright Company of Portsmouth, Virginia, to work on the Marine Base at Cherry Point, North Carolina; that he worked on this project for approximately a 3 month period starting May 16, 1955; that while working on this project he obtained a room in New Bern, North Carolina, and ate his meals in restaurants and went home on weekends by driving his automobile;

(e) That he was next employed by The Piping Equipment Company of Greensboro, North Carolina, to work on a paper mill near Acme, North Carolina; that he worked on this project for about 2 weeks and lived at his residence at Kure Beach while so employed and drove his car back and forth to work each work day;

(f) That he was next employed by Rickwell Manufacturing Company of Barberton, Ohio, to work in their shops located in Barberton, Ohio, and worked on this project approximately 1 week beginning October 3, 1955; that [fol. 12] while so employed he roomed in a rooming house and ate his meals in restaurants.

Daniel R. Dixon, Counsel for Petitioner, 507 Raleigh Building, Raleigh, North Carolina.

John Potts Barnes, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

IN THE TAX COURT OF THE UNITED STATES

Docket No. 56074

PAUL V. STINES and BETTY O. STINES, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

STIPULATION OF FACTS

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named petitioners, by their respective undersigned attorneys, that for the purpose of this proceeding only, the following facts shall be taken as true and correct; provided, however, that this stipulation does not waive the right of either party to introduce other or additional evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any of such facts on the grounds of immateriality or irrelevancy:

(1) That petitioners, Paul V. Stines and Betty O. Stines, are husband and wife and have one child who is a minor; that for the taxable year 1953 petitioners filed a joint Federal income tax return (Form 1040), a photostat copy of which is attached hereto as Exhibit A, with the District [fol. 13] Director of Internal Revenue for the District of North Carolina;

(2) That during the entire year of 1953, petitioners maintained a residence at 325 Summit Avenue in Raleigh, North Carolina; that petitioners had maintained said residence since sometime in 1952; that said petitioners were owners of this residence in the sense that they were purchasing the residence; that Betty O. Stines and their child physically resided in said residence during the entire year of 1953;

(3) That petitioner, Paul V. Stines (hereinafter referred to as Paul), is a journeyman plumber by trade and is a

member of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the Union); that he is a member of Local 785 with headquarters of said local at Raleigh, North Carolina;

(4) That Paul obtains employment through his Union; that his local sends him to job sites by means of a "referral card"; that this referral card is presented to a "job steward" at the work site who is a Union member; that the job steward then takes him to the job superintendent who represents the employer and by so doing "clears" him as a duly qualified Union member; that he is then actually hired by the job superintendent;

(5) That the job superintendent has some discretion in hiring men, in that he can refuse to hire certain persons for cause, but must eventually hire from men "sponsored" by the Union;

(6) There is no paragraph (6).

(7) That Paul has been a member of said Union since 1947; that since that date he has worked on different projects in the States of Virginia, North Carolina, South Carolina, Georgia and Florida;

[fol. 14] (8) That Paul's employment for the year 1953 was as follows:

(a) That he was employed by the Grinnell Company of Charlotte, North Carolina, to work on the DuPont Plant at Kinston, North Carolina; that he worked on this job from around March 26, 1952 until around April 10, 1953 at which time he left for personal reasons; that while so employed he rented a room with a Mrs. Sweet of Kinston, North Carolina and ate his meals in restaurants; that the distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional 8 miles; that he drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and returned once a week; and that he drove his car or rode with others to and from

the job site each working day; that transportation was arranged on a car pool basis and that he drove his car 1/5 of the time while working on the Kinston project; that he and four other persons constituted the car pool and transportation was provided by each member of the pool in turn; that the cost of operating his car was 7¢ per mile; that he normally worked five days a week but sometimes worked on Saturdays and/or Sundays and that he averaged about five and one-half days a week on this job; that while so employed the rate of pay was 14.8¢ an hour greater than the Union scale.

(b) That Paul was next employed by Carl B. Mims of Raleigh, North Carolina, and worked for said party from around April 13, 1953 to around April 28, 1953 and that such work was performed in and around the environs of Raleigh, North Carolina;

(c) That Paul was next employed by A. L. Wright and Company, Inc. of Portsmouth, Virginia, and worked for said employer from around May 6, 1953 to around June [fol. 15] 23, 1953 until he quit for personal reasons and that work for said employer was performed on the Westinghouse plant in the environs of Raleigh, North Carolina;

(d) That he was next employed by Markowitz Bros., Inc., of Miami, Florida, to work on the air base near Charleston, South Carolina, and that he worked on said air base from around June 23, 1953 to around July 15, 1953; that he went to Charleston, South Carolina, by driving his car; that the distance from Raleigh to Charleston is approximately 300 miles and the distance from his boarding house in Charleston to the plant site is approximately 11 miles; that he worked five days a week normally and drove to the job site in the morning and returned at night; that he occasionally worked on Saturday and that for the period he averaged working five and one-half days a week for this period of employment;

(e) That Paul was next employed by Biemann and Powell of Raleigh, North Carolina, and worked for said employer from August 1, 1953 through December 31, 1953; that while so "employed" he was loaned by his employer

to work for other employers for short periods as hereinafter described;

(f) That while employed by Biemann and Rowell, Paul was loaned to the firm of Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, and while so employed worked on the S. H. Kress Company job in Raleigh, North Carolina, and was also employed by Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately seven and one-half weeks;

(g) That while "employed" by Biemann and Rowell, Paul was loaned to the firm of Cooper and Goodwin (now J. B. Goodwin & Son) of Raleigh, North Carolina, and worked for said Cooper and Goodwin from December 9, 1953 through December 30, 1953; and that such work was [fol. 16] performed in and around the environs of Raleigh, North Carolina;

(9) That during the year 1953 Paul expended for room and board while working at Kinston and Fort Bragg, North Carolina, and Charleston, South Carolina, the sum of $475.13.

Daniel R. Dixon, Counsel for Petitioners, 507 Raleigh Building, Raleigh, North Carolina.

John Potts Barnes, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

In the Tax Court of the United States

Docket No. 56262

John S. Hall and Doris D. Hall, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

Stipulation of Facts

It is hereby stipulated and agreed between the Commissioner of Internal Revenue and the above-named peti-

tioners, by their respective undersigned attorneys, that for the purpose of this proceeding only, the following facts shall be taken as true and correct; provided, however, that this stipulation does not waive the right of either party to introduce other or additional evidence not at variance with the facts herein stipulated, or to object to the introduction in evidence of any of such facts on the grounds of immateriality or irrelevancy:

(1) That petitioners, John S. and Doris D. Hall, husband and wife are individuals now residing in Knightsdale, [fol. 17] North Carolina; that petitioners have three children, all of whom are minors;

(2) That for the taxable year 1953 petitioners, John S. Hall and Doris D. Hall, filed separate individual Federal income tax returns, photostat copies of which are attached hereto, respectively, as joint Exhibits 1-A and 2-B;

(3) That during the entire year of 1953, petitioners maintained a residence on Sheffield Road in Raleigh, North Carolina; that petitioners maintained said residence for approximately four years ending in the early part of 1954; that said petitioners were owners of said residence in the sense that they were purchasing the residence; that they sold the residence in the latter part of 1953 but continued to maintain residence there until the early part of 1954; that Doris D. Hall, one of the petitioners herein, and the three children of petitioners physically resided in said residence during the entire year 1953;

(4) That petitioner, John S. Hall (hereinafter referred to as John) is a welder by trade and is a member of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the Union); that he is a member of Local No. 785 of said Union with headquarters of said local in Raleigh, North Carolina;

(5) That John obtains employment through his Union; that his local sends him to job sites by means of a "referral card"; that this referral card is presented to a "job

steward" at the work site who is a Union member; that the job steward then takes him to the job superintendent who represents the employer and by so doing "clears" him as a duly qualified union member; that he is then actually hired by the job superintendent;

[fol. 18] (6) That the job superintendent has some discretion in hiring men, in that he can refuse to hire certain persons for cause, but must eventually hire from men "sponsored" by the Union;

(7) There is no paragraph (7).

(8) That John joined the Union in 1952; that since that time John has been employed as follows:

(a) That he was first employed by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at Neuse, North Carolina; that he worked on this project for a period of approximately one year until it was completed;

(b) That he was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Dupont plant at Kinston, North Carolina; that he worked on this project from October 21, 1952 through July 10, 1953; and that he resigned for personal reasons; that while working on the Dupont plant at Kinston, North Carolina he roomed with Mrs. Carl Waters of Kinston, North Carolina, and ate his meals out; that while working in Kinston he expended the total amount of $530.13 for room and board during the period January 1, 1953 through July 10, 1953; that the distance from Raleigh, North Carolina to Kinston, North Carolina by automobile is approximately 78 miles and that the distance from Kinston, North Carolina to the Dupont plant site is approximately an additional 8 miles; that John paid a fellow worker $6.50 a week for transportation and that such transportation included travel back and forth to the plant from Kinston each work day and one round trip from Raleigh, North Carolina, to Kinston, North Carolina, on weekends; that while employed on this project the rate of pay was 14.8¢ per hour greater than the Union scale; that he normally worked 5 days a week; that he

sometimes worked on Saturdays and Sundays and that he [fol. 19] averaged about 5½ days a week for this period of employment;

(c) That John was next employed by the A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh, North Carolina, and that he worked on this project from July 13, 1953 until the project was completed on March 5, 1954;

(d) That John was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the atomic energy plant at Portsmouth, Ohio, and that he worked on this project for approximately three and one-half months, and that he resigned for personal reasons;

(e) That John was next employed by B. F. Shaw at Aiken, South Carolina, to work on the atomic energy plant near Aiken, South Carolina; that he worked on said project for about two weeks and resigned this job for personal reasons;

(f) That John was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Allied Dye and Chemical Corporation plant at Hopewell, Virginia; that he worked on this project for approximately seven months; that he resigned for personal reasons;

(g) That John was next employed by Singleton, Embry and Reed of Charlotte, North Carolina, to work on the Mayo Knitting Mill plant at Tarboro, North Carolina; that he worked on this project for one month until the work was completed;

(h) That John was next employed by the O. D. Wyatt and Company of Raleigh, North Carolina, to work on the Carolina Power and Light Company plant at Moncure, North Carolina; that he worked on this project for approximately three months until the work ended;

[fol. 20] (i) That John was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the Carolina Power and Light Company plant at Moncure,

North Carolina; that John has worked on this project for approximately three months and that he is working on this project as of the present time.

Daniel R. Dixon, Counsel for Petitioners.

John Potts Barnes, Chief Counsel, Internal Revenue Service, Counsel for Respondent.

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27 T. C. No. 16

IN TAX COURT OF THE UNITED STATES

JAMES E. PEURIFOY, et al.,[1] Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Docket Nos. 55694, 56074, 56262. Filed October 31, 1956.

Deductions—Traveling Expenses.—*Held*, that the evidence establishes that the employment of the petitioners away from the places of their established residences was temporary in character and that the costs of meals, lodging and transportation constituted deductible traveling expenses while away from home. Sections 22 (n) and 23 (a) (1) (A) of the Internal Revenue Code of 1939.

Daniel R. Dixon, Esq., for the petitioners.

Hubert E. Kelly, Esq., for the respondent.

The respondent determined deficiencies in income tax for the calendar year 1953 as follows:

James E. Peurifoy	$449.88
Paul V. Stines and Betty O. Stines	492.12
John S. Hall and Doris D. Hall	365.06

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[1] Proceedings of the following petitioners are consolidated herewith: Paul V. Stines and Betty O. Stines, Docket No. 56074, and John S. Hall and Doris D. Hall, Docket No. 56262.

[fol. 21] The question presented is whether amounts expended by James E. Peurifoy, Paul V. Stines and John S. Hall, hereinafter referred to as the petitioners, for board and lodging at a job site and for transportation therefrom to their residences after termination of employment are deductible pursuant to sections 22 (n) and 23 (a) (1) (A) of the Internal Revenue Code of 1939, or whether they constitute nondeductible personal expenditures under section 24 (a) (1).

FINDINGS OF FACT—Filed October 31, 1956

In the case of each petitioner some of the facts were stipulated and are found as stipulated, the stipulations being incorporated herein by this reference.

Returns were timely filed by the petitioners for the calendar year 1953 with the district director of internal revenue for the district of North Carolina.

The petitioner James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the union). The petitioner Stines is a journeyman plumber and the petitioner Hall is a welder. Since 1947 and 1952, respectively, they have been members of Local No. 785 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local unions which send them to various work sites where they are then hired by the employer.

Members of local unions are often sent to other jurisdictions for work. In the case of a large project journeymen workers, as distinguished from foremen or superinten- [fol. 22] dents, may be drawn from various states. Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the necessary workers. If this does not produce sufficient workmen the national union will procure journeymen and apprentices from all over the country. A journey-

man craftsman working on construction projects may have several different employers in the course of a year or even though he may work for one employer throughout a year, he may work at several different job sites. In the building and construction industry, some construction jobs such as the Atomic Energy projects, may run for a period of years, but the general run of jobs is for a period of a few weeks or for a few months.

The petitioner Peurifoy is, and was during the year 1953, an unmarried individual. During the entire year 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on week ends if the place of employment is within a reasonable distance. He uses his own automobile for transportation.

He was first employed by The Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina. He worked on this project from about August 13, 1951 until about March 10, 1952.

He was next employed by The Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. He worked on this project from March 10, 1952 until November 20, 1953. While so employed he roomed and boarded near Kinston and from [fol. 23] January 1, 1953 through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54.

He was next employed by The Grinnell Company to work on the Carolina Light and Power Company plant at Mount Misery, North Carolina, situated about seven miles from Wilmington. He worked on this project from November 30, 1953, through May 14, 1955, and while he worked on this project he resided in his residence at Kure Beach. Thereafter, in 1955 he worked at Cherry Point, North Carolina, for three months, at Acme, North Carolina, for two weeks, and at Barberton, Ohio, for about one week.

In his return for 1953, he deducted the amount of $1,920.80 from gross income as "Subsistence and temporary quarters necessary for earning income, not reimbursed by employer." The respondent disallowed the entire claimed deduction on the ground that payment thereof had not been proven and that even if paid the expenditure represented personal and living expenses.

The petitioners, Paul V. Stines and Betty O. Stines, are husband and wife. Betty O. Stines appears as a petitioner by virtue of having joined in the filing of the income tax return for 1953. During the entire year 1953 they maintained a residence in Raleigh, North Carolina, and had maintained such residence since sometime in 1952. Betty O. Stines and the petitioners' minor child actually resided in such residence during the entire year 1953.

Since 1947, when he became a member of the union, the petitioner Paul V. Stines has had about 30 jobs ranging [fol. 24] in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952 until about April 10, 1953, when he was discharged. While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended $262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional eight miles. He drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and return once a week. The cost to him, under his car pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. While employed at Kinston he received 14.8 cents per hour greater than the normal union scale in accordance with the agreement between the Grinnell Company and the union. All union employees received this additional amount regardless of where they were living. This extra amount was intended to compensate the employees for time expended in going from the town of Kinston to the job site and return.

He was next employed by Carl B. Mims of Raleigh from about April 13, 1953 to about April 28, 1953, to work in and around the environs of Raleigh.

He then worked for A. L. Wright and Company, Inc. of Portsmouth, Virginia, from about May 6, 1953 to about June 23, 1953, when he quit for personal reasons. This work was performed on the Westinghouse plant near Raleigh.

His next employment was with Markovitz Bros., Inc. of Miami, Florida, to work on an air base near Charleston, [fol. 25] South Carolina. He worked there from about June 23, 1953 to about July 15, 1953. He went to Charleston by driving his car. The distance from Raleigh to Charleston is approximately 300 miles and the distance from his boarding house in Charleston to the plant site is approximately 11 miles. While at Charleston the petitioner expended $57 for room and board. The expenses incurred for driving his car from Raleigh to Charleston and return was $42.

He was next employed by Biemann and Rowell of Raleigh, North Carolina, from August 1, 1953 through December 31, 1953. While so employed he was loaned by his employer to Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, to work on the S. H. Kress Company job in Raleigh, and to Cooper and Goodwin of Raleigh to work from December 9, 1953 through December 30, 1953 in and around the environs of Raleigh. He also worked for Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately seven and one-half weeks during 1953. While there he expended $155.63 for room and board. The distance from Raleigh to Fort Bragg is approximately 50 miles. The cost of his transportation for the round trip to Fort Bragg was approximately $7.

In their return for the year 1953, the petitioners, Paul V. and Betty O. Stines, deducted the amount of $2,480 from gross income for "Subsistence and quarter [sic] non reimbursable by employer necessary to earning income." The respondent disallowed the deduction for the same reasons as in the case of the petitioner Peurifoy.

The petitioners, John S. Hall and Doris D. Hall, are husband and wife. They have three minor children. During the entire year 1953 they maintained a residence in Raleigh, North Carolina. They maintained such residence [fol. 26] for approximately four years ending in the early part of 1954. Doris D. Hall and the three children actually resided there during the entire year 1953.

The petitioner John S. Hall was first employed in 1952 by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at Neuse, North Carolina, and worked on this project until it was completed in that year.

He was next employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina, and worked on this project from October 21, 1952 through July 10, 1953. He resigned for personal reasons. While working on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953 through July 10, 1953. During this time he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. While he was employed on this project he received 14.8 cents per hour greater than the normal union scale, as explained hereinabove.

He was next employed by A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh. He worked on this project from July 13, 1953 until the project was completed on March 5, 1954.

Thereafter, in 1954 and 1955, he worked at Portsmouth, Ohio, for about three and one-half months, at Aiken, South Carolina, for about two weeks, at Hopewell, Virginia, for about seven months, at Tarboro, North Carolina, for one month, and at Moncure, North Carolina, on two successive jobs of three months each.

The petitioners, John S. Hall and Doris D. Hall, filed separate individual income tax returns for the year 1953. [fol. 27] In his return for 1953 the petitioner John S. Hall deducted from gross income the amount of $1,556.60 for the same reasons as in the case of the bursable by employer necessary to earning income." The respondent disallowed

the claimed deduction of $1,556.60 for the same reasons as in the case of the other petitioners herein. Although the petitioner and his wife filed separate returns for 1953 the respondent, in his notice of deficiency, gave the petitioner the benefit of joint filing by including in the notice of deficiency an adjustment for salary income earned by Doris D. Hall in the amount of $270.54. No error has been assigned regarding this adjustment.

The employment of the petitioners at the duPont plant at Kinston was temporary and the expenses incurred by them for food and lodging while there and for transportation therefrom to their residences upon termination of such employment were incurred while away from their homes in the pursuit of their trade.

OPINION—Filed October 31, 1956

ATKINS, *Judge*: The question presented is whether the expenses incurred by the petitioners for meals and lodging while engaged in work at the duPont plant at Kinston, and the cost of returning therefrom, upon termination of their employment, to the places of their residence, constitute allowable deductions under the provisions of sections 22 (n) and 23 (a) (1) (A) of the Internal Revenue Code of 1939,[2] or whether they are nondeductible personal, living

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[2] SEC. 22 (n) Definition of "Adjusted Gross Income."—As used in this chapter the term "adjusted gross income" means the gross income minus—

(1) Trade and Business Deductions.—The deductions allowed by section 23 which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee;

(2) Expenses of Travel and Lodging in Connection with Employment.—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) Expenses—

(1) Trade or Business Expenses.—

(A) In General.—* * * traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

[fol. 28] or family expenses within the meaning of section 24 (a) (1).[3]

There remains no controversy as to the amounts of any of the expenditures. The stipulation fixes some of the amounts and the parties on brief agree as to others. The amounts of expenditures which we have set forth in our Findings of Fact are limited to the amounts now claimed by the petitioners on brief, they having therein waived any claim of deductibility of certain expenditures.

Ordinarily the cost of meals and lodging is personal and therefore not deductible in arriving at net income. Congress has specifically provided in section 24 (a) (1) that personal, living or family expenses are not deductible. And commuting expenses to and from work have always been treated as nondeductible. *Frank H. Sullivan*, 1 B. T. A. [fol. 29] 993. Thus, it has been held that if a taxpayer chooses for reasons personal to him to maintain his residence at a place other than the place of his employment, his personal or living expenses at the place of employment do not lose their character as nondeductible personal expenditures. *Commissioner* v. *Flowers*, 326 U. S. 465. See also *Barnhill* v. *Commissioner* (C. A. 4), 148 F. 2d 913; *Ford* v. *Commissioner* (C. A. 4), 227 F. 2d 297; and *Andrews* v. *Commissioner* (C. A. 4), 179 F. 2d 502, each affirming a decision of this Court.

In the *Flowers* case, *supra*, the Supreme Court stated that "business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of the business rather than the personal conveniences and necessities of the traveler must be the motivating factors." The Supreme Court there also stated that whether particular expenditures fulfill the conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. In the *Barnhill* case, *supra*, the Court stated:

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[3] SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x); • • •

> It is clear in the first place that Congress, in prescribing the rules for the computation of net income, intended to confine the deductions for business expenses to those which are ordinary and necessary, and to prohibit the deduction of personal living or family expenses. It was recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business, and that his personal expenses during his absence on business may fairly be regarded as expenses of the business. But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, for [fol. 30] his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. * * *

As we view the situation here, we do not have the case of a taxpayer who for personal reasons, as distinguished from the requirements of his business, maintains his residence at a place other than that of his actual employment. Each of the petitioners before us is a construction worker and each maintained a residence at a particular place, Peurifoy at Kure Beach, near Wilmington, North Carolina, and Stines and Hall at Raleigh, North Carolina. Each of them belonged to a local union at or near the place of his residence and each obtained employment through that union. The stipulated facts show that throughout a number of years, including the taxable year before us, they have worked at various job sites both at or near their residences and at distant points, sometimes in other states, for varying periods of time. There was no particular place where any one of them principally had employment, although each of them at times worked at or near the place where he maintained his residence. The record indicates that each was accustomed to return to the place of his residence upon the completion of a job. Impelling reasons for the accept-

ance of employment away from the place of residence readily come to mind, such as the availability of work, the current pay scale, or working conditions.

In this situation we are of the opinion that when any of the petitioners accepted temporary employment away from the places of their residence, they reasonably could not have been expected to establish a residence at the places [fol. 31] of employment. In those instances the expenses incurred at the place of employment are considered as being due to the exigencies of the trade or business. That was the situation in *Harry F. Schurer*, 3 T. C. 544, and *E. G. Leach*, 12 T. C. 20, in which we held the traveling expenses to be deductible. The respondent recognizes that this is the proper view and concedes that the employment of the petitioner Paul V. Stines at Charleston, South Carolina, for about 3 weeks and at Fort Bragg, North Carolina, for about 7½ weeks was temporary and that expenses incurred by him in traveling to those places to accept employment and returning to Raleigh and the cost of board and lodging while at those places are deductible.

On the other hand, he contends that the expenses incurred by each of the petitioners in connection with employment at the duPont plant at Kinston, North Carolina, are not deductible. He argues that that job was not temporary, but was of indefinite or indeterminate duration, relying principally upon the length of time the petitioners were employed there, Peurifoy for about 20½ months, Paul V. Stines for about 12½ months, and John S. Hall for about 8½ months, portions of which periods fell within the taxable year. He relies upon the line of cases in which the position has been taken that if the employment is of indefinite duration, the additional living costs and the transportation costs incurred because of failure to bring together the place of residence and the place of employment are deemed to have been occasioned by reasons of personal choice or convenience, resulting in the nondeductibility of the expenses. See *Willard S. Jones*, 13 T. C. 880; *Beatrice H. Albert*, 13 T. C. 129; *Commissioner* v. *Andrews*, *supra*; and *Ford* v. *Commissioner*, *supra*.

[fol. 32] The principal factor upon which those cases turned was the nature of the employment. In the *Albert*

case we said that the employment "was not the sort of employment in which termination within a short period could be foreseen, as was the situation in *Harry F. Schurer*, 3 T. C. 544, and *E. G. Leach*, 12 T. C. 20." In the *Jones* case the taxpayer was required to work for his employer until released and he could not obtain other work without a release. In the *Andrews* case the employment was "for the duration of the war" and was characterized by the court as being "of indefinite tenure." In the *Ford* case the taxpayer had a regular and continuing employment with one employer over a number of years as subforeman and later as piping superintendent.

The petitioners argue that any employment upon a construction project is temporary in that by its very nature it is terminable, and that hence any expense in connection therewith should be considered as deductible business expense. We think it obvious that such a flat rule cannot be adopted. Each case must be decided upon the basis of its own facts and circumstances, including those relating to the known or contemplated duration of the work, the taxpayer's intent with regard to the maintenance or establishment of business headquarters, and any facts that develop during the course of the employment. Employment which may appear to be temporary in character at the start may ripen into employment of indefinite duration. See *Arnold P. Bark*, 6 T. C. 851. Furthermore, employment may be of such relatively long actual duration as to indicate, in the absence of evidence to the contrary, that the employment was either indefinite at the start or developed into indefinite employment.

[fol. 33] Upon the record in the instant cases, we think that the employment at Kinston was of the same general nature as that involved in the *Schurer* and *Leach* cases, *supra*. The petitioner Hall testified that when they entered upon a job at a particular site, including the Kinston job, they were not guaranteed the job for any specified time and did not know how long they would be employed there, although there was usually some hearsay information as to the duration of the work. Thus, as to all three of the petitioners, there was no reason for them to believe that the nature of the job would be any different from that of

other jobs which formed the general pattern of their employment. Each of the petitioners did, upon termination of his work at Kinston, return to the place of his residence and take employment there. On these facts the employment in question is properly to be considered as temporary in nature. In such a situation it would not be reasonable to expect them to shift their residences to the place of employment or to regard Kinston as their "home" for tax purposes.

We conclude that the cost of board and lodging of each of the petitioners at Kinston and the cost of their transportation from Kinston to Raleigh and Kure Beach, respectively, upon termination of this particular employment constitute traveling expenses incurred while away from home in the pursuit of his trade within the intendment of section 23 (a) (1) (A), and that they are deductible under section 22 (n). See *Carroll B. Mershon*, 17 T. C. 861.

Reviewed by the Court.

Decisions will be entered under Rule 50.

[fol. 34]

IN THE TAX COURT OF THE UNITED STATES, WASHINGTON

Docket No. 55694

JAMES E. PEURIFOY, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered January 8, 1957

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1956, the respondent herein, on January 3, 1957, filed a recomputation for entry of decision and the petitioner having noted his acquiescence thereon, it is

Ordered and Decided: That there is an overpayment in income tax for the taxable year 1953 in the amount

of $48.42, all of which was paid within two years before the mailing of the notice of deficiency.

Entered January 8, 1957.

(Signed) Allin H. Pierce, Judge.

In the Tax Court of the United States, Washington

Docket No. 56074

Paul V. Stines and Betty O. Stines, Petitioners,

v.

Commissioner of Internal Revenue, Respondent.

Decision—Entered January 8, 1957

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1956, the respondent herein, on January 3, 1957, filed a recomputation for entry of decision and the petitioners having noted their acquiescence thereon, it is

[fol. 35] Ordered and Decided: That there is an overpayment in income tax for the taxable year 1953 in the amount of $94.58, all of which was paid within two years before the mailing of the notice of deficiency.

Entered January 8, 1957.

(Signed) Allin H. Pierce, Judge.

IN THE TAX COURT OF THE UNITED STATES, WASHINGTON

Docket No. 56262

JOHN S. HALL and DORIS D. HALL, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION—Entered January 8, 1957

Pursuant to the determination of the Court, as set forth in its Findings of Fact and Opinion, filed October 31, 1956, the respondent herein, on January 3, 1957, filed a recomputation for entry of decision and the petitioners having noted their acquiescence thereon, it is

Ordered and Decided: That there is an overpayment in income tax for the taxable year 1953 in the amount of $61.80, all of which was paid within two years before the mailing of the notice of deficiency.

Entered January 8, 1957.

(Signed) Allin H. Pierce, Judge.

[fol. 37]

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

On Petitions to Review the Decisions of The Tax Court of the United States

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DOCKET ENTRIES

June 26, 1957, transcript of record, in duplicate, filed and cause docketed.

June 26, 1957, certified copy of order of May 8, 1957, extending the time to July 3, 1957, for filing the record on review and docketing the petitions for review in this court filed.

June 28, 1957, appearance of Daniel R. Dixon entered for the respondents.

June 28, 1957, appearance of Nelson P. Rose, Chief Counsel, and Vernon F. Weekley, Special Attorney, Internal Revenue Service, entered for the petitioner.

June 29, 1957, appearance of Charles K. Rice, Assistant Attorney General, and John N. Stull, Attorney, Department of Justice, entered for the petitioner.

September 7, 1957, brief and appendices for petitioner filed.

September 7, 1957, appearance of Charles K. Rice, Assistant Attorney General, Lee A. Jackson and Kenneth E.

Levin, Attorneys, Department of Justice, entered for the petitioner.

September 27, 1957, brief for respondents filed.

[fol. 38]

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—October 18, 1957 (omitted in printing)

[fol. 39]

IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

On Petitions to Review the Decisions of The Tax Court of the United States

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Argued October 18, 1957

Before SOPER and HAYNSWORTH, Circuit Judges, and THOMPSON, District Judge.

OPINION—Decided November 11, 1957

Kenneth E. Levin, Attorney, Department of Justice, (Charles K. Rice, Assistant Attorney General, and Lee A. Jackson, Attorney, Department of Justice, on brief) for Petitioner, and Daniel R. Dixon for Respondents.

[fol. 40] HAYNSWORTH, Circuit Judge:

We have for review a decision of the Tax Court[1] which held that the Commissioner had improperly assessed deficiencies of income tax to three construction workers. The claimed deficiencies arose upon the disallowance by the Commissioner of living expenses of the three workers while each was employed upon a construction project at Kinston, North Carolina, and of the travel expense of each when, upon the termination of his employment, he returned to his residence.

The taxpayer, Peurifoy, an unmarried individual, maintained a residence at Kure Beach near Wilmington, North Carolina. He resided in this house when employed in the vicinity of Wilmington and, at other times, used it on week ends if the place of his employment was not unreasonably distant.

Peurifoy was first employed as a pipe welder in the construction of a paper mill at Acme, North Carolina. After approximately seven months, he left that employment to work on a new plant for the duPont company under construction near Kinston, North Carolina. He was employed on that project for approximately 20½ months ending November 20, 1953. Thereafter he was employed for approximately 17½ months in the construction of an electric generating plant at Mount Misery, North Carolina, for approximately 3 months in construction work on the Marine Base at Cherry Point, North Carolina, for two weeks on a paper mill project near Acme, North Carolina, and for one week in Barberton, Ohio. The record does not indicate [fol. 41] whether any of these employments were terminated for cause, in consequence of completion of the work or for reasons personal to the taxpayer.

The taxpayer, Stines, is married and, beginning sometime in 1952 maintained a residence for his family in Raleigh, North Carolina. A journeyman plumber, he has had approximately thirty jobs since 1947 ranging in duration from two weeks to more than a year. On March 26, 1952,

[1] *James E. Peurifoy, et al.* v. *Commissioner*, 27 T.C. 149.

he was employed to work on the duPont plant near Kinston and left 12½ months later, on April 10, 1953. It is stipulated that he left this employment for personal reasons.[2]

The taxpayer, Hall, is married and about 1950 acquired a house for his family in Raleigh, North Carolina. He sold this house in the latter part of 1953, but his family continued to reside there until early in 1954. At the time of the stipulation, he was a resident of Knightsdale, North Carolina.

After working for approximately a year in the construction of a textile plant at Neuse, North Carolina, he was employed as a welder in the construction of the duPont plant near Kinston. This employment began October 21, 1952, and ended on July 10, 1953, when he resigned for reasons personal to him. Subsequently, he was employed in the construction of (1) a factory at Raleigh, North Carolina, for 7½ months, (2) an atomic energy plant at Portsmouth, Ohio, for 3½ months, (3) an atomic energy plant near Aiken, South Carolina, for 2 weeks, (4) a chemical plant at Hopewell, Virginia, for 7 weeks, (5) a textile [fol. 42] plant at Tarboro, North Carolina, for 1 month, (6) an electric generation plant at Moncure, North Carolina, for 3 months and (7) the same Moncure plant (for a different contractor) in which work he was engaged at the time of the stipulation. He resigned for personal reasons from his jobs at Portsmouth, Aiken and Hopewell as well as from that at Kinston.

While employed at the duPont plant near Kinston, Peurifoy boarded at a house, approximately 1 mile from the plant site, though he went to Kure Beach on weeks (sic) ends. The boarding house is approximately 122 miles from his house at Kure Beach and approximately 102 miles from Wilmington which he claims as his tax home.

During the period of their employment at the duPont plant, Stines and Hall rented rooms in Kinston, though on

[2] Stines testified that the "personal reason" for his leaving was that he was discharged after walking off the job during working hours to attend to a personal errand.

week ends they went to Raleigh where their families resided. Kinston is approximately 78 miles from Raleigh.

The record does not show when the construction of the duPont plant near Kinston began or when it was completed. Nor does it disclose the period of employment of welders, pipe welders or plumbers, the trades practiced by these taxpayers. It does reveal that Peurifoy and Stines were employed on this project in March 1952. Hall was not employed there until October 1952, but he had been engaged in other employment until then. We are informed that when Stines and Hall quit their jobs at Kinston in April and July 1953, respectively, they did so for personal reasons, not because work for people of their trades was no longer available. The reason for Peurifoy's leaving in November 1953 is not mentioned. It would appear from these facts, however, that it was a construction project of some size and of substantial duration.

[fol. 43] The only testimony bearing upon the duration of the work was that of Hall who testified that on all construction jobs, including that at Kinston, they were not guaranteed a job for any specific period nor were they told by the employer how long the work was expected to last. There was talk among the workers of the probable duration of the work. He did not mention, however, what his, or their, expectation was with respect to the duPont project near Kinston.

The only other circumstance considered by the Tax Court as relevant was the membership of Peurifoy in a union local with headquarters in Wilmington and of Stines and Hall in a union local with headquarters in Raleigh, the fact that each received referrals from his local union and the general preference of each for employment in the vicinity to employment at more distant points. But if subjective considerations of personal preference have any bearing upon the problem, it is difficult to find in these considerations any distinction between the case of the construction worker, who, without the assistance of a local union, seeks and obtains employment preferably in the vicinity of the residence of his family but at other times at more distant

points. It is stipulated that a union referral is not tantamount to employment and that the individual worker must apply to the contractor at the job site for employment. Upon that application, he is employed or not depending upon the needs and preferences of the employer.

Upon these facts, we think the Tax Court was in error in finding that the employment of these taxpayers on the duPont project at Kinston was temporary and in concluding that their maintenance expense while there and the expense of travel at the termination of their employment was [fol. 44] deductible under section 23 (a)(1)(A) of the Internal Revenue Code.[3]

Work in the heavy construction industry, by its very nature, has a degree of impermanence. Employment is usually for each job only and lasts no longer than the need at that project for the particular skill of the individual employee. Upon many of the larger projects, however, such need, and the actual employment of an individual, may last for several, even many, years. Other projects may be of comparatively short duration. It is also a characteristic of the industry, as shown in the stipulations in this case, that upon larger construction projects outside the larger metropolitan centers, the local supply of the necessary skills must be greatly augmented by workers coming from other places. Work in the industry, therefore, is, to some extent, transient as well as impermanent.

Construction workers are not the only ones, however, who find it necessary or profitable to move or seek em-

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[3] "§23. Deductions from gross income. In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *."

ployment from place to place, and the Tax Court, in its opinion in these cases, recognizes that the transient and impermanent aspect of work in heavy construction does not itself distinguish construction work from other employment or hold the answer to our problem. Indeed these character-
[fol. 45] istics of the industry tend to strip from a remote residence elements essential to its status as the sole "tax home."

When a taxpayer accepts employment at a place removed from the residence he maintains for his family, his travel and maintenance expense is not usually deductible under §23(a)(1)(A). *Commissioner* v. *Flowers*, 326 U. S. 465, 66 S.Ct. 250, 90 L.Ed. 203. Indeed under the rule of Commissioner v. Flowers the expense, in order to be deductible, must be "required by the exigencies" of the employer's business, not those of the calling of the employee. "The job, not the taxpayer's pattern of living, must require the travel." *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, 249. That an employee for reasons personal to himself and his family maintains a home at a distance from his business does not serve the business of the employer and ordinarily his travel expense and the expense of his maintenance at either place is not deductible. *Commissioner* v. *Flowers*, supra., *Barnhill* v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210.

Where, however, an individual, who has a well established tax home, accepts temporary employment of short duration away from his tax home, it has been held that his travel and maintenance are allowable deductions under §23(a)(1)(A) and are not "personal, living or family expenses" within the meaning of §24(a)(1) even though such expenses are not incurred for the benefit of the employer. *Coburn* v. *Commissioner*, 2 Cir., 138 F. 2d 763, *Schurer* v. *Commissioner*, 3 T.C. 544, *Leach* v. *Commissioner*, 12 T.C. 20. If we assume the validity of this exception to the rule of Commissioner v. Flowers as applied to one not self-employed, it is essential that the employment away from the established tax home shall be temporary in contempla-
[fol. 46] tion at the time of its acceptance and not indeterminate in fact as it develops. However justified he may be

from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary business expense within the meaning of §23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S.Ct. 250, 90 L.Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521.

When the taxpayers in these cases went into the Tax Court, carrying the burden of showing that the Commissioner's determination was incorrect, they produced nothing to show that their employment on the duPont project was not of indefinite duration. It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. For aught that appears, work might have been available there for all three for much longer than 20½ months. While each of them may have accepted other employment at other times which was temporary, that does not tend to prove that this employment was temporary and not of substantial or indefinite duration. And though subjective consideration of the reasonableness of their moving their residences to their post of duty may have some bearing in determining the applicability of §24 (a)(1), it does not establish the deductibility of maintenance expenses under §23(a)(1)(A). *Bercaw* v. *Commissioner*, supra.; *Warren* v. *Commissioner*, 13 T. C. 205; *Whitaker* v. *Commissioner*, 24 T.C. 750.

[fol. 47] The question of deductibility of such expenses is ordinarily one of fact. When the conclusionary finding that the work was temporary and maintenance expense deductible was clearly erroneous, however, it is our right and duty to reverse it.

Reversed.

[fol. 49]

IN UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Respondents.

On Petitions to Review the Decisions of The Tax Court of the United States

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JUDGMENT—November 11, 1957

This Cause came on to be heard on the transcript of the record from The Tax Court of the United States, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the decisions of the said The Tax Court of the United States, in this cause, be, and the same are hereby, reversed; and that this cause be, and the same is hereby, remanded to The Tax Court of the United States for further proceedings consistent with the opinion of the Court filed herein.

November 11, 1957.

Clement F. Haynsworth, Jr., United States Circuit Judge.

December 12, 1957, mandate issued and transmitted to the Clerk of the Tax Court of the United States.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51]

IN SUPREME COURT OF THE UNITED STATES

No. ....., October Term, 1957

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—February 10, 1958

Upon Consideration of the application of counsel for petitioner(s),

It Is Ordered that the time for filing petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including April 11th, 1958.

/s/ Earl Warren, Chief Justice of the United States.

Dated this 10th day of February, 1958.

[fol. 52]

IN SUPREME COURT OF THE UNITED STATES

No. 910, October Term, 1957

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, et al., Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE.

ORDER ALLOWING CERTIORARI—May 19, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1958

No. [redacted] 46

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No.

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of The United States Court of Appeals for the Fourth Circuit, entered in the above-entitled case on November 11, 1957.

OPINIONS BELOW

The opinion of the Tax Court of the United States is reported at 27 T.C. 149 and is printed in Appendix B hereto at page 4a. The opinion of the United States Court of Appeals for the Fourth Circuit is reported

at — F. 2d — (unreported at time of instant writing) and is printed in Appendix B hereto at page 15a.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on November 11, 1957. (Appendix B, p. 15a.) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1254 and 26 U.S.C. Section 7482.

QUESTIONS PRESENTED

(1) Where petitioners entered upon certain construction employments away from their established residences prior to the taxable year and terminated such employments during the taxable year, the question is presented as to whether or not the amounts expended during the taxable year by said petitioners for

(a) board and lodging while so employed as construction workers at or near the construction site, and for

(b) transportation to return to their respective residences upon termination of such employments

are non-deductible expenses within the provisions of Section 24 (a)(1) of the Internal Revenue Code of 1939, as amended.

(2) If question (1) be answered in the negative, the further question is presented as to whether or not the expenses in question are deductible under the provi-

sions of Section 23(a)(1)(A) and Section 22(n) of the Internal Revenue Code of 1939, as amended.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

(a) Constitution of the United States, Amendment Thirteen. (Appendix A, p. 1a.)

(b) 26 U.S.C. (1952) Section 22(n), being Section 22(n) of the Internal Revenue Code of 1939, as amended. Enacted by Section 8, Individual Income Tax Act of 1944, C.210, 58 Stat. 231 (Appendix A, p. 1a.)

(c) 26 U.S.C. (1952) Section 23(a)(1)(A), being Section 23(a)(1)(A) of the Internal Revenue Code of 1939, as amended. Enacted by Section 121(a) of the Revenue Act of 1942, C.619, 56 Stat. 798. (Appendix A, p. 1a.)

(d) 26 U.S.C. (1952) Section 24(a)(1), being Section 24(a)(1) of the Internal Revenue Code of 1939, as amended. Enacted by Section 127(b) of Revenue Act of 1942, C.619, 56 Stat. 798. (Appendix A, p. 2a.)

(e) Treasury Regulation 118, Section 39.22(n)-1, promulgated under Internal Revenue Code of 1939, as amended, 26 C.F.R. (1953 Revision) Section 39.22(n)-1. (Appendix A, p. 2a.)

(f) Treasury Regulation 118, Section 39.23(a)-1, promulgated under Internal Revenue Code of 1939, as amended, 26 C.F.R. (1953 Revision) Section 39.23(a)-1. (Appendix A, p. 3a.)

(g) Treasury Regulation 118, Section 39.23(a)-2, promulgated under Internal Revenue Code of 1939, as amended, 26 C.F.R. (1953 Revision) Section 39.23(a)-2. (Appendix A, p. 3a.)

STATEMENT

(a) Jurisdiction of Court of First Instance

The basis for federal jurisdiction in The Tax Court Of The United States, which is the court of first instance for this proceeding, is found in Section 272 and Section 1101 of the Internal Revenue Code of 1939, as amended. (26 U.S.C. (1952) Sections 272 and 1101).

(b) Facts Pertinent to All Petitioners

Petitioner Betty O. Stines did not have taxable income during the taxable year 1953 here involved. She appears as a petitioner in this proceeding as a nominal party by virtue of filing a joint income tax return with her spouse. (R. 12.)

Petitioner Doris D. Hall filed a separate return for the year 1953 and appears as a party to this proceeding only in respect to the matter of procuring the benefits of filing a joint return with her spouse. The respondent has conceded Petitioners John S. Hall and Doris D. Hall are entitled to compute their income taxes for 1953 under the provisions pertinent to the filing of joint returns and this matter is not in issue in this proceeding. (Appendix B, p. 9a.)

The term petitioners is hereinafter used to refer to the petitioners, James E. Peurifoy, Paul V. Stines and John S. Hall.

Each of the petitioners are construction workers and are employed in what is known as the heavy construction industry. The petitioners are members of the trade union known as the United Asso-

ciation of Journeymen and Apprentices of the Plumbing And Pipefitting Industry Of The United States and Canada. (Hereinafter referred to as the Union). (R. 9, 13, 17.)

Each of the petitioners obtains employment through the respective local headquarters of the Union. The local sends the petitioners to a job site by means of a "referral card". This referral card "clears" the holder as a qualified union member. Petitioners are hired by the job superintendent who is the representative of the employer. The job superintendent has some discretion in hiring, in that he can refuse to hire certain persons for cause, but must eventually hire persons sponsored by the Union. Upon termination of their respective employments at a job site, petitioners return to their local headquarters for new "referrals". (R. 9, 13, 17.)

A construction site is not a place of permanent employment for either the employers or employees engaged in construction. Upon completion of the phase of construction in which engaged, both employers and employees must seek new employment elsewhere. (Appendix B, pp. 5a, 19a.) The Tax Court determined as a conclusion of fact that the construction employments herein in controversy were "temporary" in nature. (Appendix B, p. 14a.) The United States Court of Appeals for the Fourth Circuit overruled this determination by the Tax Court and held that there was no evidence to sustain the determination of the Tax Court that the instant employments were "temporary". (Appendix B, p. 21a.) Such determination of the court below is believed to be erroneous.

(c) Facts Pertinent to Petitioner Peurifoy

Petitioner Peurifoy is an unmarried individual. He owns his "home" situated at Kure Beach, North Carolina, near Wilmington, North Carolina. He lives in his "home" whenever employment in the vicinity permits. If the employment is not too remote he returns to his "home" on week-ends. (R. 9.)

Petitioner Peurifoy is a pipe welder and a member of Local No. 329 of the Union with headquarters of said local in Wilmington, North Carolina. His employment itinerary since joining the Union on August 13, 1952 to time of trial is as follows (R. 9, 10-12):

Employment Site	Starting Date	Period
Acme, North Carolina	8/13/51	7 Months
Kinston, North Carolina	3/10/52	20½ Months
Mount Misery, North Carolina	11/30/53	17½ Months
Cherry Point, North Carolina	5/16/55	3 Months
Acme, North Carolina	Not Known	2 Weeks
Barberton, Ohio	10/3/55	1 Week

The employment here involved is that at Kinston, North Carolina, which began on 3/10/52 and lasted for approximately 20½ months. During 1953 petitioner expended $496.00 for room and board while away from "home" in pursuit of such employment and expended the sum of $8.54 for transportation to return to his "home" upon completion of such employment. These expenses, which have been stipulated to be in the amounts of $496.00 and $8.54 respectively, are the expenses in controversy in this proceeding in respect to petitioner Peurifoy. (Appendix B, p. 6a.)

(d) Facts Pertinent to Petitioner Stines

Petitioner Stines is married and has one child. Petitioner Stines owned his "home" in Raleigh, North

Carolina in 1953. His wife and child physically resided in this "home" during the entire year 1953. (R. 12-13.)

Petitioner Stines is a journeyman plumber and a member of Local No. 785 of the Union, with headquarters of said local in Raleigh, North Carolina. His employment itinerary since joining the Union in 1947 is not a matter of detailed record but includes about 30 jobs ranging in duration from 2 weeks to over a year. The employments beginning March 26, 1952 to time of trial were as follows (R. 13-16):

Employment Site	Starting Date	Period
Kinston, North Carolina	3/26/52	12½ Months
Raleigh, North Carolina	4/13/53	2 Weeks
Raleigh, North Carolina	5/6/53	6 Weeks
Charleston, South Carolina	6/23/53	3 Weeks
Raleigh, North Carolina	8/1/53	5 Months
Fort Bragg, North Carolina	Not Known	7½ Weeks
Raleigh, North Carolina	12/9/53	3 Weeks

Each of the above listed employments represents a different construction project even though in or near the same city. The last two employments listed above were made under conditions whereby his employer "loaned" petitioner Stines to other employers. Thus the 7½ week period and the 3 week period of such employments were included in the immediately preceding 5 months employment period.

The employment herein involved is that at Kinston, North Carolina which began on 3/26/52 and lasted approximately 12½ months. During 1953 petitioner Stines expended $262.50 for room and board while away from "home" in pursuit of such employment and expended the sum of $1.09 for transportation to re-

turn to his "home" upon completion of such employment. These expenses, which have been stipulated to be in the amounts of $262.50 and $1.09 respectively, are the expenses in controversy in this proceeding in respect to petitioner Stines. (Appendix B, p. 7a.)

In connection with his employment at Charleston, South Carolina, which began on 5/6/53 and lasted approximately 3 weeks, petitioner Stines expended $57.00 for room and board while away from "home" in pursuit of such employment and expended the sum of $42.00 for transportation to and from such place of employment. These expenditures in the respective amounts of $57.00 and $42.00 have been conceded to be deductible by the respondent and are not in issue in his proceeding. (Appendix B, pp. 8a, 12a, 13a.)

In connection with his employment at Fort Bragg, North Carolina, petitioner Stines expended $155.63 for room and board and $7.00 for transportation. These expenditures have also been conceded by the respondent to be deductible and are not in issue in this proceeding. (Appendix B, pp. 8a, 12a, 13a.)

(c) Facts Pertinent to Petitioner Hall

Petitioner Hall is married and has three children. Petitioner Hall owned his "home" in Raleigh, North Carolina in 1953. His wife and three children physically resided in this "home" during the entire year 1953. (R. 17.)

Petitioner Hall is a welder by trade and is a member of Local 785 of the Union with headquarters of said local in Raleigh, North Carolina. His employment

itinerary since joining the Union in 1952 is as follows (R. 18-20):

Employment Site	Starting Date	Period
Neuse, North Caroline	Not Known	1 Year
Kinston, North Carolina	10/21/52	8½ Months
Raleigh, North Carolina	7/13/53	7½ Months
Portsmouth, Ohio	Not Known	3½ Months
Aiken, South Carolina	Not Known	2 Weeks
Hopewell, Virginia	Not Known	7 Months
Tarboro, North Carolina	Not Known	1 Month
Moncure, North Carolina	Not Known	3 Months
Moncure, North Carolina	Not Known	3 Months

The employment here involved is that at Kinston, North Carolina which began on 10/21/52 and lasted for a period of approximately 8½ months. During 1953 petitioner Hall expended $530.13 for room and board while away from "home" in pursuit of such employment and expended the further sum of $2.01 to return to his "home" upon completion of such employment. These expenses, which have been stipulated to be in the amounts of $530.13 and $2.01 respectively, are the expenses in controversy in this proceeding in respect to petitioner Hall. (Appendix B, p. 9a.)

(f) Judicial History of Proceedings

In their respective returns, each of the petitioners claimed as a deduction for travel expenses an amount greater than the amount stipulated to be correct in respect to each of the petitioners. No controversy exists as to disallowance of the amounts in excess of the stipulated amounts. The issues herein are concerned only with the action of the respondent in disallowing the deductions claimed for the travel expenses which were incurred in fact and which are stipulated to be correct as to their amounts.

These expenses in question were disallowed by the respondent for the alleged reason that they constituted "personal and living expenses" the deduction of which is prohibited by Section 24(a)(1) of the Internal Revenue Code of 1939, as amended. Substantially, identical explanations for such disallowances appear in each of the statutory 90 day letters sent to each of the petitioners. (Appendix B, pp. 7a, 8a, 9a.)

Petitioners contested the deficiencies resulting from the disallowance of the claimed expenses and filed timely petitions in the Tax Court of The United States. The actions were consolidated for trial and after hearing on the matter, a decision was rendered by the Tax Court of The United States under date of October 31, 1956. In its opinion, which was reviewed by the entire court without dissent, the Tax Court sustained petitioners in their claims for the deduction of the expenses in question. (Appendix B, p. 14a.)

Thereafter the Commissioner Of Internal Revenue appealed the decision of The Tax Court of The United States to the United States Court of Appeals for the Fourth Circuit. This latter court reversed the holding of the Tax Court. (Appendix B, p. 21a.)

There is no dispute over the applicability of Section 22(n). It is agreed that if the expenses in question are deductible under the provisions of Section 23(a)(1)(A) they are deductible under the provisions of Section 22(n).

REASONS FOR GRANTING THE WRIT

(a) The Decision Below Is in Conflict With a Decision of the Ninth Circuit

The decision below of the United States Court of Appeals for the Fourth Circuit is directly in conflict with the decision of the United States Court of Appeals for the Ninth Circuit in the case of *Wallace* v. *Commissioner*, 144 F. 2d 407 (9th Cir. 1944). (Appendix C, p. 36a.)

The decision of the court below rests squarely on the proposition that the word "home" as used in Section 23(a)(1)(A) of the Internal Revenue Code of 1939 means the "place of employment" of the petitioner. This doctrine first found expression in the Fourth Circuit in the case of *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945) which is cited in the opinion of the court below. (Appendix B, p. 20a.)

This conflict in the decisions of the circuits was recognized by this Court in the case of *Commissioner* v. *Flowers*, 326 U.S. 465, 471 (1946), wherein this Court said (Appendix C, p. 27a):

> "The meaning of the word 'home' in Section 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Merten's Law of Federal Income Taxation (1942) Sec. 25.82. The Tax Court and the administrative rulings have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner*, supra, (C.C.A. 4). On the other hand, the decision below and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.C.A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.C.A. 2).

> "We deem it unnecessary here to enter into or decide this conflict."

The "difficulty and litigation" engendered by this conflict in meaning of the word "home" has continued unabated throughout the years that have elapsed since this Court made its pronouncement.

(b) The Decision Below Is in Conflict With the Controlling Decision Rendered by This Court

The decision of the United States Court of Appeals for the Fourth Circuit is in conflict with the decision of this Court rendered in *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). (Appendix C, p. 22a). The *Flowers* case is the controlling decision on this problem and has been cited no less than 140 times since its enunciation.

(1) The decision below is in conflict with the *Flowers* decision in that the decision below is based on a doctrine not sanctioned by the *Flowers* decision.

It is clear that this Court did not sanction the doctrine that "home is synonymous with place of employment" in the *Flowers* case as evidenced by the language therein referring to this point when this Court said (Appendix C, p. 28a):

> "We deem it unnecessary here to enter into or decide this conflict."

The decision below rests squarely on the premise that a place of employment is tantamount to the "home" of the petitioner as that word is used in Section 23(a)(1)(A) of the Internal Revenue Code of 1939, as amended.

(2) The decision below is in further conflict with the *Flowers* decision in that the decision below was not based on a determination of facts as required by the *Flowers* decision.

This Court in *Commissioner* v. *Flowers* rested its decision on the *factual* determination that the expenses there in question were not required by the exigencies of "the business". The pertinent language is as follows (Appendix C, p. 29a):

> "The *facts* demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad." (Emphasis added).

In respect to the factual aspects of this type of case, this Court said (Appendix C, p. 26a):

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to a deduction is purely a question of fact in most instances."

In the decision below there was *no factual* determination that the expenses were not required by the exigencies of the business. The Tax Court, whose determinations of fact are presumptively conclusive, reached a decision on this point favorable to the petitioners and decided that the expenses in question *were* required by the exigencies of "the business". (Appendix B, pp. 9a, 10a.)

The court below *alleged* in its opinion that such expenses were *not* required by the business *of the employer* in order to give colorable compliance with the controlling principles set forth in *Commissioner* v. *Flowers*. Such conclusion in the court below was

not based on a determination *of fact* that such expenses were not required by the exigencies of the business as was done in the *Flowers* case, but was the result of the application of the principle that "home is the place of employment". This principle was applied by the court below as a rule of substantive law and thus operated to deny the deduction *without* inquiring into the *facts* regarding the necessity of the expenditures.

Petitioners were denied the deduction *because* their employments "were away from home". The identical situation for which the statute created the deduction. The doctrine which deems the place of employment to be the "tax home" immediately denies the deduction without inquiry into the facts as required by *Commissioner* v. *Flowers*. This is so for the reason that under the doctrine of the court below petitioner is deemed to carry his "home" with him to his place of employment as a matter of substantive law. When this doctrine is applied, petitioner *cannot* meet the statutory requirement of being "away from home" irrespective of the *actual fact* that he *is* away from home.

The rationale of the court below is disclosed in the following extract of the opinion (Appendix C, p. 20a):

> "When a taxpayer accepts employment at a place removed from the residence he maintains for his family his travel and maintenance expense is not usually deductible under Sec. 23(a)(1)(A). *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203. Indeed under the rule of *Commissioner* v. *Flowers* the expense in order to be deductible must be 'required by the exigencies' of the employer's business, not those of the calling

> of the employee. 'The job not the taxpayer's pattern of living, must require the travel.' *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, 249. That an employee for reasons personal to himself and his family maintains a home at a distance from his business does not serve the business of the employer and ordinarily his travel expense and the expense of his maintenance at either place is not deductible. *Commissioner* v. *Flowers*, supra, *Barnhill* v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210."

The conclusion of the court below that the expenses in question were "personal" did not result from an independent finding of fact as was true in the *Flowers* case. The court below first determined that the expenses in question were not deductible because the "places of employment were deemed to be the taxpayers' homes" and hence that taxpayers failed to meet the statutory requirement of being "away from home". The court below then classified the expenses in question as "personal" for the *reason* that the court itself had already determined the expenses to be nondeductible. The Tax Court determined as a question of fact that the expenses in question were *not* personal. (Appendix B, p. 12a.)

The existence of fundamental error in the decision below is further disclosed by the language in the opinion of the court below wherein it referred to an "exception" to the rule of the *Flowers* case. (Appendix C, p. 20a.)

> ". . . If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self employed, . . ."

The decisions of this court constitute the supreme law of the land. As a matter of jurisprudence, there can be no "exceptions" to a mandate of this Court if the matter is within the orbit of the controlling decision of this Court. The efforts of the court below to find justification for its decision by taking the position that taxpayers failed to qualify for an "exception" to a Supreme Court decision *cannot* have logical basis.

(3) The decision below was in further conflict with the *Flowers* decision in that it erroneously concluded that the expenses were deductible only if required by the exigencies of the *employer's business.* The *Flowers* decision also permitted the deduction of such expenses if required by the *taxpayer's business.* In this respect the court below said (Appendix C, p. 20a):

> ". . . Indeed under the rule of *Commissioner* v. *Flowers* the expense, in order to be deductible must be 'required by the exigencies' of the employer's business, *not those of the calling of the employee.*" (Emphasis added.)

In this respect this Court stated in *Commissioner* v. *Flowers* (Appendix C, p. 26a):

> "(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer *or* of his employer." (Emphasis added)

The question of whether or not the instant expenses were required by the trade or business of the petitioner or the trade or business of the employer need not be answered immediately. However, it is apparent that such expenses are *not* rendered non-deductible

by the *Flowers* decision because they were incurred by the exigencies of the trade or business of the employee rather than the exigencies of the business of the employer as was maintained by the court below.

(4) The decision below is in further conflict with the *Flowers* case in that it denied the deduction to petitioners for failure to meet a requirement not found in the statutes or in the *Flowers* case. In this respect the court below said (Appendix C, p. 20a):

> ". . . If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self-employed, it is essential that the employment away from the established tax home shall be temporary in contemplation at the time of its acceptance and not indeterminate in fact as it develops."

From the above it is clear that the court below made "temporary employment" an absolute condition of deductibility. In *Commissioner* v. *Flowers*, supra, this court said (Appendix C, p. 26a):

> "Three conditions must be satisfied before a traveling expense deduction may be made under Section 23(a)(1)(A).
>
> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred while away from home.
>
> (3) The expense must be incurred in pursuit of business. This means there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure

must be necessary or appropriate to the development and pursuit of the business or trade."

The requirements established by this Court do not include "temporary employment" as a condition of deductibility.

(c) The Decision Below Contravenes the Constitution of the United States

In its opinion the court below made reference on numerous occasions to the voluntary terminations of some of the employments of the petitioners. The frequency of such references creates an inescapable conclusion that such voluntary terminations of the employments by the petitioners influenced the decision of the court below. The references in the opinion are as follows:

". . . The record does not indicate whether any of these employments were terminated for cause, in consequence of completion of the work or for reasons personal to the taxpayer." (Appendix B, p. 16a.)

* * * * *

". . . It is stipulated that he left this employment for personal reasons." (Appendix B, p. 16a.)

* * * * *

"(Footnote). Stines testified that the 'personal reasons' for his leaving was that he was discharged after walking off the job during working hours to attend to a personal errand." (Appendix B, p. 16a.)

* * * * *

". . . This employment began October 21, 1952, and ended on July 10, 1953, when he resigned for reasons personal to him." (Appendix B, p. 17a.)

* * * * *

". . . He resigned for personal reasons from his jobs at Portsmouth, Aiken and Hopewell as well as from that at Kinston." (Appendix B, p. 17a.)

* * * * *

". . . We are informed that when Stines and Hall quit their jobs at Kinston in April and July, 1953, respectively, they did so for personal reasons, not because work for people of their trades was no longer available. The reason for Peurifoy's leaving in November, 1953 is not mentioned." (Appendix B, p. 18a.)

* * * * *

". . . It is clear that two of them left that employment for personal reasons when work was still available while the third left after 20½ months for an undisclosed reason. For aught that appears, work might have been available there for all three for much longer than 20½ months." (Appendix B, p. 21a.)

The purport of the above language seems clear. The court below seeks to deny to taxpayers who quit their jobs voluntarily the status of "temporary employment" in respect to such employments by concluding these employments could ripen into "indefinite" employment if petitioners had not "quit" their jobs. The result is to deny such a taxpayer a deduction to which he might otherwise be entitled because he cannot meet the requirements of "temporary employment" which has become established in the Fourth Circuit and in the Tax Court decisions.

The final result is to apply the tax laws of the country in a manner that penalizes a taxpayer for the sole reason that he quit his job of his own volition or even because he was discharged.

Such an application of the tax laws exercises a coercive influence on a taxpayer and tends to force him to continue work against his will. Such an application of the tax laws of this country deprives petitioner of a free choice in selecting his place of employment and is in contravention of the Thirteenth Amendment of the Constitution of the United States which prohibits involuntary servitude.

(d) The Decision Below Involves an Issue of National Importance That Affects the Entire Mobile Labor Force of the Heavy Construction Industry

A study of the facts in this case discloses that petitioners are representatives of the class of workers employed in the heavy construction industry. The opinion of the court below recognizes that the nature of the work is such that heavy importation of a large supply of skilled workers is normal and necessary for a large construction project and that the usual method of recruiting such labor is through the mechanism provided by the trade unions. (Appendix B, p. 19a.)

The number of persons employed in this mobile labor force is conjectural. However, it is known that there are approximately 3,500,000 members in the Building and Construction Trades Department of the American Federation of Labor-Congress of Industrial Organizations.

The importance of this problem is evidenced by the fact that the issue has been under study by the staff of the Legal and Monetary Affairs Subcommittee of the Committee on Government Operations of the House of Representatives of the Congress of the United States for some time.

The importance of this problem to the trade unions is evidenced by the fact that the costs of this litigation are being paid by the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada which is one of the larger trade unions in this country.

(c) The Decision Below Involves an Unsettled Question of Federal Law

Reference has previously been made to the language of this Court in the case of *Commissioner* v. *Flowers* wherein this Court said (Appendix C, p. 28a):

> "We deem it unnecessary here to enter into or to decide this conflict."

The failure of this Court to pass decision on the important question of whether or not the word "home" as used in the pertinent statute means "home" in its common everyday meaning or has acquired a special meaning as the "place of employment" has "engendered much difficulty and litigation" as noted in the *Flowers* case, supra.

Litigation in respect to this important question has multiplied in recent years and there is indication that it will continue to be a source of confusion and litigation until it is authoritatively settled by this Court.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

Constitutional Provision, Statutes and Regulations

(a) Constitution of The United States, Amendment Thirteen.

> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted shall exist within the United States, or any place subject to their jurisdiction.

(b) 26 U.S.C. (1952) Section 22(n), being Section 22(n) of the Internal Revenue Code of 1939, as amended. Enacted by Section 8, Individual Income Tax Act of 1944, C. 210, 58 Stat. 231.

> Sec. 22. Gross Income
>
> (n) *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—
>
> (2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

(c) 26 U.S.C. (1952) Section 23(a)(1)(A), being Section 23(a)(1)(A) of the Internal Revenue Code of 1939, as amended. Enacted by Section 121(a) of the Revenue Act of 1942, C. 619, 56 Stat. 798.

> Sec. 23. Deductions From Gross Income.
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in

carrying on any trade or business, including * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

(d) 26 U.S.C. (1952) Section 24(a)(1) being Section 24 (a)(1) of the Internal Revenue Code of 1939, as amended. Enacted by Section 127(b) of Revenue Act of 1942, C. 619, 56 Stat. 798.

Sec. 24. Items Not Deductible.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);

(e) Treasury Regulation 118, Section 39.22(n)-1, promulgated under Internal Revenue Code of 1939, as amended, 26 C.F.R. (1953 Revision) Section 39.22(n)-1.

Sec. 39.22(n)-1. *Adjusted gross income.*

(a) The term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under section 23 as are specified in section 22(n). * * *

(b) Section 22(n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstances that a particular item is specified in one of the clauses under section 22(n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(c) The deductions specified in section 22(n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in

connection with the performance by him of services as an employee; (3) deductions allowable by section 23 (other than expenses of travel, meals, and lodging while away from home) which consist of expenses paid or incurred in connection with the performance of services as an employee under a reimbursement or other expense-allowance arrangement with his employer; * * *

(d) For the purpose of the deductions specified in section 22(n) the performance of personal services as an employee does not constitute the carrying on of a trade or business. * * *

(f) Treasury Regulation 118, Section 39.23(a)-1, promulgated under Internal Revenue Code of 1939, as amended. 26 C.F.R. (1953 Revision) Section 39.23(a)-1.

Sec. 39.23(a)-1. *Business expenses.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Among the items included in business expenses are * * * traveling expenses while away from home solely in the pursuit of a trade or business * * *.

(g) Treasury Regulation 118, Section 39.23(a)-2, promulgated under Internal Revenue Code of 1939, as amended. 26 C.F.R. (1953 Revision) Section 39.23(a)-2.

Sec. 39.23(a)-2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

(g) A taxpayer claiming the benefit of the deductions referred to in this section must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on busniess during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

(h) Claim for the deductions referred to in this section must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

(i) Commuters' fares are not considered as business expenses and are not deductible.

APPENDIX B

Opinions and Judgments Below

Tax Court of the United States

JAMES E. PEURIFOY, ET AL.,[1] Petitioner, v. Commissioner of Internal Revenue, Respondent. Docket Nos. 55694, 56074, 56262. Filed October 31, 1956.

Deductions—Traveling Expenses.—Held, that the evidence establishes that the employment of the petitioners away from the places of their established residences was temporary in character and that the costs of meals, lodging and transportation constituted deductible traveling expenses while away from home. Sections 22(n) and 23(a)(1)(A) of the Internal Revenue Code of 1939.

Daniel R. Dixon, Esq., for the petitioners.

Hubert E. Kelly, Esq., for the respondent.

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[1] Proceedings of the following petitioners are consolidated herewith: Paul V. Stines and Betty O. Stines, Docket No. 56074, and John S. Hall and Doris D. Hall, Docket No. 56262.

The respondent determined deficiencies in income tax for the calendar year 1953 as follows:

James E. Peurifoy	$449.88
Paul V. Stines and Betty O. Stines	492.12
John S. Hall and Doris D. Hall	365.96

The question presented is whether amounts expended by James E. Peurifoy, Paul V. Stines and John S. Hall, hereinafter referred to as the petitioners, for board and lodging at a job site and for transportation therefrom to their residences after termination of employment are deductible pursuant to sections 22(n) and 23(a)(1)(A) of the Internal Revenue Code of 1939, or whether they constitute nondeductible personal expenditures under section 24(a)(1).

Findings of Fact

In the case of each petitioner some of the facts were stipulated and are found as stipulated, the stipulations being incorporated herein by this reference.

Returns were timely filed by the petitioners for the calendar year 1953 with the district director of internal revenue for the district of North Carolina.

The petitioner James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as The United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada (hereinafter referred to as the union). The petitioner Stines is a journeyman plumber and the petitioner Hall is a welder. Since 1947 and 1952, respectively they have been members of Local No. 785 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local unions which send them to various work sites where they are then hired by the employer.

Members of local unions are often sent to other jurisdictions for work. In the case of a large project journeymen workers, as distinguished from foremen or superintendents, may be drawn from various states. Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the necessary workers. If this does not produce

sufficient workmen the national union will procure journeymen and apprentices from all over the country. A journeyman craftsman working on construction projects may have several different employers in the course of a year or even though he may work for one employer throughout a year, he may work at several different job sites. In the building and construction industry, some construction jobs such as the Atomic Energy projects, may run for a period of years, but the general run of jobs is for a period of a few weeks or for a few months.

The petitioner Peurifoy is, and was during the year 1953, an unmarried individual. During the entire year 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on week ends if the place of employment is within a reasonable distance. He uses his own automobile for transportation.

He was first employed by The Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina. He worked on this project from about August 13, 1951 until about March 10, 1952.

He was next employed by The Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. He worked on this project from March 10, 1952 until November 20, 1953. While so employed he roomed and boarded near Kinston and from January 1, 1953 through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54.

He was next employed by The Grinnell Company to work on the Carolina Light and Power Company plant at Mount Misery, North Carolina, situated about seven miles from Wilmington. He worked on this project from November 30, 1953 through May 14, 1955, and while he worked on this project he resided in his residence at Kure Beach. Thereafter, in 1955 he worked at Cherry Point, North Carolina, for three months, at Acme, North Carolina, for two weeks, and at Barberton, Ohio, for about one week.

In his return for 1953, he deducted the amount of $1,920.80 from gross income as "Subsistence and temporary quarters necessary for earning income, not reimbursed by employer." The respondent disallowed the entire claimed deduction on the ground that payment thereof had not been proven and that even if paid the expenditure represented personal and living expenses.

The petitioners, Paul V. Stines and Betty O. Stines, are husband and wife. Betty O. Stines appears as a petitioner by virtue of having joined in the filing of the income tax return for 1953. During the entire year 1953 they maintained a residence in Raleigh, North Carolina, and had maintained such residence since sometime in 1952. Betty O. Stines and the petitioners' minor child actually resided in such residence during the entire year 1953.

Since 1947, when he became a member of the union, the petitioner Paul V. Stines has had about 30 jobs ranging in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952 until about April 10, 1953, when he was discharged. While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended $262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional eight miles. He drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and returned once a week. The cost to him, under his car pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. While employed at Kinston he received 14.8 cents per hour greater than the normal union scale in accordance with the agreement between the Grinnell Company and the union. All union employees received this additional amount regardless of where they were living. This extra amount was intended to compensate the employees for time expended in going from the town of Kinston to the job site and return.

He was next employed by Carl B. Mims of Raleigh from about April 13, 1953 to about April 28, 1953, to work in and around the environs of Raleigh.

He then worked for A. L. Wright and Company, Inc. of Portsmouth, Virginia, from about May 6, 1953 to about June 23, 1953, when he quit for personal reasons. This work was performed on the Westinghouse plant near Raleigh.

His next employment was with Markowitz Bros., Inc. of Miami, Florida, to work on an air base near Charleston, South Carolina. He worked there from about June 23, 1953 to about July 15, 1953. He went to Charleston by driving his car. The distance from Raleigh to Charleston is approximately 300 miles and the distance from his boarding house in Charleston to the plant site is approximately 11 miles. While at Charleston the petitioner expended $57 for room and board. The expenses incurred for driving his car from Raleigh to Charleston and return was $42.

He was next employed by Biemann and Rowell of Raleigh, North Carolina, from August 1, 1953 through December 31, 1953. While so employed he was loaned by his employer to Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, to work on the S. H. Kress Company job in Raleigh, and to Cooper and Goodwin of Raleigh to work from December 9, 1953 through December 30, 1953 in and around the environs of Raleigh. He also worked for Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately seven and one-half weeks during 1953. While there he expended $155.63 for room and board. The distance from Raleigh to Fort Bragg is approximately 50 miles. The cost of his transportation for the round trip to Fort Bragg was approximately $7.

In their return for the year 1953, the petitioners, Paul V. and Betty O. Stines, deducted the amount of $2,480 from gross income for "Subsistence and quarter [sic] non reimbursable by employer necessary to earning income." The respondent disallowed the deduction for the same reasons as in the case of the petitioner Peurifoy.

The petitioners, John S. Hall and Doris D. Hall, are husband and wife. They have three minor children. During the entire year 1953 they maintained a residence in Raleigh, North Carolina. They maintained such residence for approximately four years ending in the early part of 1954. Doris D. Hall and the three children actually resided there during the entire year 1953.

The petitioner John S. Hall was first employed in 1952 by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at Neuse, North Carolina, and worked on this project until it was completed in that year.

He was next employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina, and worked on this project from October 21, 1952 through July 10, 1953. He resigned for personal reasons. While working on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953 through July 10, 1953. During this time he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. While he was employed on this project he received 14.8 cents per hour greater than the normal union scale, as explained hereinabove.

He was next employed by A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh. He worked on this project from July 13, 1953 until the project was completed on March 5, 1954.

Thereafter, in 1954 and 1955, he worked at Portsmouth, Ohio, for about three and one-half months, at Aiken, South Carolina, for about two weeks, at Hopewell, Virginia, for about seven months, at Tarboro, North Carolina, for one month, and at Moncure, North Carolina, on two successive jobs of three months each.

The petitioners, John S. Hall and Doris D. Hall, filed separate individual income tax reurns for the year 1953. In his return for 1953 the petitioner John S. Hall deducted from gross income the amount of $1,556.60 as "Subsistence and quarters non reimbursable by employer necessary to earning income." The respondent disallowed the claimed deduction of $1,566.60 for the same reasons as in the case of the other petitioners herein. Although the petitioner and his wife filed separate returns for 1953 the respondent, in his notice of deficiency, gave the petitioner the benefit of joint filing by including in the notice of deficiency an adjustment for salary income earned by Doris D. Hall in the amount of $270.54. No error has been assigned regarding this adjustment.

The employment of the petitioners at the duPont plant at Kinston was temporary and the expenses incurred by

them for food and lodging while there and for transportation therefrom to their residences upon termination of such employment were incurred while away from their homes in the pursuit of their trade.

Opinion

Atkins, Judge:

The question presented is whether the expenses incurred by the petitioners for meals and lodging while engaged in work at the duPont plant at Kinston, and the cost of returning therefrom, upon termination of their employment, to the places of their residence, constitute allowable deductions under the provisions of sections 22(n) and 23(a)(1)(A) of the Internal Revenue Code of 1939,[2] or whether they are non-deductible personal, living or family expenses within the meaning of section 24(a)(1)[3].

There remains no controversy as to the amounts of any of the expenditures. The stipulation fixes some of the amounts and the parties on brief agree as to others. The

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[2] Sec. 22(n). Definition of "Adjusted Gross Income."—As used in this chapter the term "adjusted gross income" means the gross income minus—

(1) Trade and Business Deductions.—The deductions allowed by section 23 which are attributable to a trade or business carried on by the taxpayer, if such trade or business does not consist of the performance of services by the taxpayer as an employee;

(2) Expenses of Travel and Lodging in Connection with Employment.—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

[3] Sec. 23. Deductions From Gross Income.

In computing net income there shall be allowed as deductions:

(a) Expenses—

(1) Trade or Business Expenses.—

(A) In General.—* * * traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *

(3) Sec. 24. Items Not Deductible.

(a) General Rule.—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x); * * *

amounts of expenditures which we have set forth in our Findings of Fact are limited to the amounts now claimed by the petitioners on brief, they having therein waived any claim of deductibility of certain expenditures.

Ordinarily the cost of meals and lodging is personal and therefore not deductible in arriving at net income. Congress has specifically provided in section 24(a)(1) that personal, living or family expenses are not deductible. And commuting expenses to and from work have always been treated as nondeductible. Frank H. Sullivan, 1 B.T.A. 993. Thus, it has been held that if a taxpayer chooses for reasons personal to him to maintain his residence at a place other than the place of his employment, his personal or living expenses at the place of employment do not lose their character as nondeductible personal expenditures. *Commissioner* v. *Flowers*, 326 U. S. 465 [34 AFTR 301]. See also *Barnhill* v. *Commissioner* (C.A. 4), 148 F. 2d 913 [33 AFTR 1203]; *Ford* v. *Commissioner* (C.A. 4), 227 F. 2d 297; and *Andrews* v. *Commissioner* (C.A. 4), 179 F.2d 502 [38 AFTR 1328], each affirming a decision of this Court.

In the *Flowers* case, *supra*, the Supreme Court stated that "business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of the business rather than the personal conveniences and necessities of the traveler must be the motivating factors." The Supreme Court there also stated that whether particular expenditures fulfil the conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. In the *Barnhill* case, *supra*, the Court stated:

> It is clear in the first place that Congress, in prescribing the rules for the computation of net income, intended to confine the deductions for business expenses to those which are ordinary and necessary, and to prohibit the deduction of personal living or family expenses. It was recognized that the taxpayer must maintain a home for his family at his own expense even when he is absent on business, and that his personal expenses during his absence on business may fairly be regarded as expenses of the business. But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business, but by the action of the taxpayer in having his home, for his

> own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. * * *

As we view the situation here, we do not have the case of a taxpayer who for personal reasons, as distinguished from the requirements of his business, maintains his residence at a place other than that of his actual employment. Each of the petitioners before us is a construction worker and each maintained a residence at a particular place. Peurifoy at Kure Beach, near Wilmington, North Carolina, and Stines and Hall at Raleigh, North Carolina. Each of them belonged to a local union at or near the place of his residence and each obtained employment through that union. The stipulated facts show that throughout a number of years, including the taxable year before us, they have worked at various job sites both at or near their residences and at distant points, sometimes in other states, for varying periods of time. There was no particular place where any one of them principally had employment, although each of them at times worked at or near the place where he maintained his residence. The record indicates that each was accustomed to return to the place of his residence upon the completion of a job. Impelling reasons for the acceptance of employment away from the place of residence readily come to mind, such as the availability of work, the current pay scale, or working conditions.

In this situation we are of the opinion that when any of the petitioners accepted temporary employment away from the places of their residence, they reasonably could not have been expected to establish a residence at the places of employment. In those instances the expenses incurred at the place of employment are considered as being due to the exigencies of the trade or business. That was the situation in *Harry F. Schurer*, 3 T.C. 544, and *E. G. Leach*, 12 T.C. 20, in which we held traveling expenses to be deductible. The respondent recognizes that this is the proper view and concedes that the employment of the petitioner Paul V. Stines at Charleston South Carolina, for about 3 weeks and at Fort Bragg, North Carolina, for about 7½ weeks was temporary and that expenses incurred by him in traveling

to those places to accept employment and returning to Raleigh and the cost of board and lodging while at those places are deductible.

On the other hand, he contends that the expenses incurred by each of the petitioners in connection with employment at the du Pont plant at Kinston, North Carolina, are not deductible. He argues that that job was not temporary, but was of indefinite or indeterminate duration, relying principally upon the length of time the petitioners were employed there, Peurifoy for about 20½ months, Paul V. Stines for about 12½ months, and John S. Hall for about 8½ months, portions of which periods fell within the taxable year. He relies upon the line of cases in which the position has been taken that if the employment is of indefinite duration, the additional living costs and the transportation costs incurred because of failure to bring together the place of residence and the place of employment are deemed to have been occasioned by reasons of personal choice or convenience, resulting in the nondeductibility of the expenses. See *Willard S. Jones*, 13 T.C. 880; *Beatrice H. Albert*, 13 T.C. 129; *Commission* v. *Andrews, supra;* and *Ford* v. *Commissioner, supra.*

The principal factor upon which these cases turned was the nature of the employment. In the *Albert* case we said that the employment "was not the sort of employment in which termination within a short period could be foreseen, as was the situation in *Harry F. Schurer*, 3 T.C. 544, and *E. G. Leach*, 12 T.C. 20." In the *Jones* case the taxpayer was required to work for his employer until released and he could not obtain other work without a release. In the *Andrews* case the employment was "for the duration of the war" and was characterized by the court as being "of indefinite tenure." In the *Ford* case the taxpayer had a regular and continuing employment with one employer over a number of years as subforeman and later as piping superintendent.

The petitioners argue that any employment upon a construction project is temporary in that by its very nature it is terminable, and that hence any expense in connection therewith should be considered as deductible business expense. We think it obvious that such a flat rule cannot be adopted. Each case must be decided upon the basis of its own facts and circumstances, including those relating to the known or contemplated duration of the work, the tax-

payer's intent with regard to the maintenance or establishment of business headquarters, and any facts that develop during the course of the employment. Employment which may appear to be temporary in character at the start may ripen into employment of indefinite duration. See *Arnold P. Bark*, 6 T.C. 851. Furthermore, employment may be of such relatively long actual duration as to indicate, in the absence of evidence to the contrary, that the employment was either indefinite at the start or developed into indefinite employment.

Upon the record in the instant cases, we think that the employment at Kinston was of the same general nature as that involved in the *Schurer* and *Leach* cases, *supra*. The petitioner Hall testified that when they entered upon a job at a particular site, including the Kinston job, they were not guaranteed the job for any specified time and did not know how long they would be employed there, although there was usually some hearsay information as to the duration of the work. Thus, as to all three of the petitioners, there was no reason for them to believe that the nature of the job would be any different from that of other jobs which formed the general pattern of their employment. Each of the petitioners did, upon termination of his work at Kinston, return to the place of his residence and take employment there. On these facts the employment in question is properly to be considered as temporary in nature. In such a situation it would not be reasonable to expect them to shift their residences to the place of employment or to regard Kinston as their "home" for tax purposes.

We conclude that the cost of board and lodging of each of the petitioners at Kinston and the cost of their transportation from Kinston to Raleigh and Kure Beach, respectively, upon termination of this particular employment constitute traveling expenses incurred while away from home in the pursuit of his trade within the intendment of section 23(a)(1)(A), and that they are deductible under section 22(n). See *Carroll B. Mershon*, 17 T.C. 861.

Reviewed by the Court.

Decisions will be entered under Rule 50.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 7479

COMMISSIONER OF INTERNAL REVENUE,
Petitioner.

VERSUS

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL,
Respondents.

ON PETITIONS TO REVIEW THE DECISIONS OF THE TAX COURT OF THE UNITED STATES

(Argued October 18, 1957. Decided November 11, 1957)

Before SOPER AND HAYNSWORTH, Circuit Judges, and THOMPSON, District Judge.

KENNETH E. LEVIN, *Attorney*, Department of Justice, (CHARLES K. RICE, *Assistant Attorney General*, and LEE A. JACKSON, *Attorney*, Department of Justice, on brief) for Petitioner, and DANIEL R. DIXON for Respondents.

HAYNSWORTH, *Circuit Judge:*

We have for review a decision of the Tax Court [1] which held that the Commissioner had improperly assessed deficiencies of income tax to three construction workers. The claimed deficiencies arose upon the disallowance by the Commissioner of living expenses of the three workers while each was employed upon a construction project at Kinston, North Carolina, and of the travel expense of each when, upon the termination of his employment, he returned to his residence.

[1] *James E. Peurifoy, et al.* v. *Commissioner*, 27 T.C. 149.

The taxpayer, Peurifoy, an unmarried individual, maintained a residence at Kure Beach near Wilmington, North Carolina. He resided in this house when employed in the vicinity of Wilmington and, at other times, used it on week ends if the place of his employment was not unreasonably distant.

Peurifoy was first employed as a pipe welder in the construction of a paper mill at Acme, North Carolina. After apprximately seven months, he left that employment to work on a new plant for the duPont company under construction near Kinston, North Carolina. He was employed on that project for approximately 20½ months ending November 20, 1953. Thereafter he was employed for approximately 17½ months in the construction of an electric generating plant at Mount Misery, North Carolina, for approximately 3 months in construction work on the Marine Base at Cherry Point, North Carolina, for two weeks on a paper mill project near Acme, North Carolina, and for one week in Barberton, Ohio. The record does not indicate whether any of these employments were terminated for cause, in consequence of completion of the work or for reasons personal to the taxpayer.

The taxpayer, Stines, is married and, beginning sometime in 1952 maintained a residence for his family in Raleigh, North Carolina. A journeyman plumber, he has had approximately thirty jobs since 1947 ranging in duration from two weeks to more than a year. On March 26, 1952, he was employed to work on the duPont plant near Kinston and left 12½ months later, on April 10, 1953. It is stipulated that he left this employment for personal reasons.[2]

The taxpayer, Hall, is married and about 1950 acquired a house for his family in Raleigh, North Carolina. He sold this house in the latter part of 1953, but his family

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[2] Stines testified that the "personal reasons" for his leaving was that he was discharged after walking off the job during working hours to attend to a personal errand.

continued to reside there until early in 1954. At the time of the stipulation, he was a resident of Knightsdale, North Carolina.

After working for approximately a year in the construction of a textile plant at Nouse, North Carolina, he was employed as a welder in the construction of the duPont plant near Kinston. This employment began October 21, 1952, and ended on July 10, 1953, when he resigned for reasons personal to him. Subsequently, he was employed in the construction of (1) a factory at Raleigh, North Carolina, for 7½ months, (2) an atomic energy plant at Portsmouth, Ohio, for 3½ months, (3) an atomic energy plant near Aiken, South Carolina, for 2 weeks, (4) a chemical plant at Hopewell, Virginia, for 7 weeks, (5) a textile plant at Tarboro, North Carolina, for 1 month, (6) and electric generation plant at Moncure, North Carolina, for 3 months and (7) the same Moncure plant (for a different contractor) in which work he was engaged at the time of the stipulation. He resigned for personal reasons from his jobs at Portsmouth, Aiken and Hopewell as well as from that at Kinston.

While employed at the duPont plant near Kinston, Peurifoy boarded at a house, approximately 1 mile from the plant site, though he went to Kure Beach on weeks ends. The boarding house is approximately 122 miles from his house at Kure Beach and approximately 102 miles from Wilmington which he claims as his tax home.

During the period of their employment at the duPont plant, Stines and Hall rented rooms in Kinston, though on week ends they went to Raleigh where their families resided. Kinston is approximately 78 miles from Raleigh.

The record does not show when the construction of the duPont plant near Kinston began or when it was completed. Nor does it disclose the period of employment of welders, pipe welders or plumbers, the trades practiced by these taxpayers. It does reveal that Peurifoy and Stines were employed on this project in March 1952. Hall was not employed there until October 1952, but he had

been engaged in other employment until then. We are informed that when Stines and Hall quit their jobs at Kinston in April and July 1953, respectively, they did so for personal reasons, not because work for people of their trades was no longer available. The reason for Peurifoy's leaving in November 1953 is not mentioned. It would appear from these facts, however, that it was a construction project of some size and of substantial duration.

The only testimony bearing upon the duration of the work was that of Hall who testified that on all construction jobs, including that at Kinston, they were not guaranteed a job for any specific period nor were they told by the employer how long the work was expected to last. There was talk among the workers of the probable duration of the work. He did not mention, however, what his, or their, expectation was with respect to the duPont project near Kinston.

The only other circumstance considered by the Tax Court as relevant was the membership of Peurifoy in a union local with headquarters in Wilmington and of Stines and Hall in a union local with headquarters in Raleigh, the fact that each received referrals from his local union and the general preference of each for employment in the vicinity to employment at more distant points. But if subjective considerations of personal preference have any bearing upon the problem, it is difficult to find in these considerations any distinction between the case of the construction worker, who, without the assistance of a local union, seeks and obtains employment preferably in the vicinity of the residence of his family but at other times at more distant points. It is stipulated that a union referral is not tantamount to employment and that the individual worker must apply to the contractor at the job site for employment. Upon that application, he is employed or not depending upon the needs and preferences of the employer.

Upon these facts, we think the Tax Court was in error in finding that the employment of these taxpayers on the

du Pont project at Kinston was temporary and in concluding that their maintenance expense while there and the expense of travel at the termination of their employment was deductible under section 23(a)(e)(A) of the Internal Revenue Code.[3]

Work in the heavy construction industry, by its very nature, has a degree of impermanence. Employment is usually for each job only and lasts no longer than the need at that project for the particular skill of the individual employee. Upon many of the larger projects, however, such need, and the actual employment of an individual, may last for several, even many, years. Other projects may be of comparatively short duration. It is also a characteristic of the industry, as shown in the stipulations in this case, that upon larger construction projects outside the larger metropolitan centers, the local supply of the necessary skills must be greatly augmented by workers coming from other places. Work in the industry, therefore, is, to some extent, transient as well as impermanent.

Construction workers are not the only ones, however, who find it necessary or profitable to move or seek employment from place to place, and the Tax Court, in its opinion in these cases, recognizes that the transient and impermanent aspect of work in heavy construction does not itself distinguish construction work from other employment or hold the answer to our problem. Indeed these characteristics of the industry tend to strip from

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[3] "Sec. 23. Deductions from gross income. In computing net income there shall be allowed as deductions:

(a) Expenses.

(1) Trade or business expenses.

(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; [redacted]."

a remote residence elements essential to its status as the sole "tax home."

When a taxpayer accepts employment at a place removed from the residence he maintains for his family, his travel and maintenance expense is not usually deductible under Sec. 23(a)(1)(A). *Commissioner* v. *Flowers*, 326 U. S. 465, 66 S. Ct. 250, 90 L. Ed. 203. Indeed under the rule of *Commissioner* v. *Flowers* the expense, in order to be deductible, must be "required by the exigencies" of the employer's business, not those of the calling of the employee. "The job, not the taxpayer's pattern of living, must require the travel." *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246,249. That an employee for reasons personal to himself and his family maintains a home at a distance from his business does not serve the business of the employer and ordinarily his travel expense and the expense of his maintenance at either place is not deductible. *Commissioner* v. *Flowers, supra., Barnhill* v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A. L. R. 1210.

Where, however, an individual, who has a well established tax home, accepts temporary employment of short duration away from his tax home, it has been held that his travel and maintenance are allowable deductions under Sec. 23(a)(1)(A) and are not "personal, living or family expenses" within the meaning of Sec. 24(a)(1) even though such expenses are not incurred for the benefit of the employer. *Coburn* v. *Commissioner*, 2 Cir., 138 F. 2d 763, *Schurer* v. *Commissioner*, 3 T.C. 544, *Leach* v. *Commissioner*, 12 T.C. 20. If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self-employed, it is essential that the employment away from the established tax home shall be temporary in contemplation at the time of its acceptance and not indeterminate in fact as it develops. However justified he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary business expense within the

meaning of Sec. 23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521.

When the taxpayers in these cases went into the Tax Court, carrying the burden of showing that the Commissioner's determination was incorrect, they produced nothing to show that their employment on the dul'ont project was not of indefinite duration. It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. For aught that appears, work might have been available there for all three for much longer than 20½ months. While each of them may have accepted other employment at other times which was temporary, that does not tend to prove that this employment was temporary and not of substantial or indefinite duration. And though subjective consideration of the reasonableness of their moving their residences to their post of duty may have some bearing in determining the applicability of Sec. 24(a)(1), it does not establish the deductibility of maintenance expenses under Sec. 23(a)(1)(A). *Bercaw* v. *Commissioner*, *supra.*; *Warren* v. *Commissioner*, 13 T.C. 205; *Whitaker* v. *Commissioner*, 24 T.C. 750.

The question of deductibility of such expenses is ordinarily one of fact. When the conclusionary finding that the work was temporary and maintenance expense deductible was clearly erroneous, however, it is our right and duty to reverse it.

REVERSED.

APPENDIX C

Conflicting Opinions

The Supreme Court of the United States

Commissioner of Internal Revenue v. *Flowers.*

No. 145.

Argued Dec. 11, 12, 1945.

Decided Jan. 2, 1946.

Rehearing Denied Jan. 28, 1946.

See 326 U.S. 812, 66 S. Ct. 482.

* * * * * * * * * * *

Mr. Justice RUTLEDGE dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

Certiorari by Commissioner of Internal Revenue to review a judgment of the Circuit Court of Appeals, 148 F. 2d 163, reversing a decision of the Tax Court of the United States, redetermining income tax deficiencies for 1939 and 1940 of J. N. Flowers, imposed by the Commissioner of Internal Revenue.

Judgment reversed.

Mr. J. Louis Monarch, of Washington, D. C., for petitioner.

Mr. J. N. Ogden, of Mobile, Ala., for respondent.

Mr. Justice MURPHY delivered the opinion of the Court.

This case presents a problem as to the meaning and application of the provision of § 23(a)(1)(A) of the Internal Revenue Code [1] allowing a deduction for income tax

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[1] 26 U.S.C. § 23(a) (1) (A), as amended, 56 Stat. 819, 26 U.S.C.A. Int. Rev. Code, § 23 (a) (1) (A).

"§ 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or business expenses.

"(A) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling

purposes of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business."

The taxpayer, a lawyer, has resided with his family in Jackson, Mississippi, since 1903. There he has paid taxes, voted, schooled his children and established social and religious connections. He built a house in Jackson nearly thirty years ago and at all times has maintained it for himself and his family. He has been connected with several law firms in Jackson, one of which he formed and which has borne his name since 1922.

In 1906 the taxpayer began to represent the predecessor of the Gulf, Mobile & Ohio Railroad, his present employer. He acted as trial counsel for the railroad throughout Mississippi. From 1918 until 1927 he acted as special counsel for the railroad in Mississippi. He was elected general solicitor in 1927 and continued to be elected to that position each year until 1930, when he was elected general counsel. Thereafter he was annually elected general counsel until September, 1940, when the properties of the predecessor company and another railroad were merged and he was elected vice president and general counsel of the newly formed Gulf, Mobile & Ohio Railroad.

The main office of the Gulf, Mobile & Ohio Railroad is in Mobile, Alabama, as was also the main office of its predecessor. When offered the position of general solicitor in 1927, the taxpayer was unwilling to accept it if it required him to move from Jackson to Mobile. He had established himself in Jackson both professionally and personally and was not desirous of moving away. As a result, an arrangement was made between him and the railroad whereby he

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expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

could accept the position and continue to reside in Jackson on condition that he pay his traveling expenses between Mobile and Jackson and pay his living expenses in both places. This arrangement permitted the taxpayer to determine for himself the amount of time he would spend in each of the two cities and was in effect during 1939 and 1940, the taxable years in question.

The railroad company provided an office for the taxpayer in Mobile but not in Jackson. When he worked in Jackson his law firm provided him with office space, although he no longer participated in the firm's business or shared in its profits. He used his own office furniture and fixtures at this office. The railroad, however, furnished telephone service and a typewriter and desk for his secretary. It also paid the secretary's expenses while in Jackson. Most of the legal business of the railroad was centered in or conducted from Jackson, but this business was handled by local counsel for the railroad. The taxpayer's participation was advisory only and was no different from his participation in the railroad's legal business in other areas.

The taxpayer's principal post of business was at the main office in Mobile. However, during the taxable years of 1939 and 1940, he devoted nearly all of his time to matters relating to the merger of the railroads. Since it was left to him where he would do his work, he spent most of his time in Jackson during this period. In connection with the merger, one of the companies was involved in certain litigation in the federal court in Jackson and the taxpayer participated in that litigation.

During 1939 he spent 203 days in Jackson and 66 in Mobile, making 33 trips between the two cities. During 1940 he spent 168 days in Jackson and 102 in Mobile, making 40 trips between the two cities. The railroad paid all of his traveling expenses when he went on business trips to points other than Jackson or Mobile. But it paid none

of his expenses in traveling between these two points or while he was at either of them.

The taxpayer deducted $900 in his 1939 income tax return and $1,620 in his 1940 return as traveling expenses incurred in making trips from Jackson to Mobile and as expenditures for meals and hotel accommodations while in Mobile.[2] The Commissioner disallowed the deductions, which action was sustained by the Tax Court. But the Fifth Circuit Court of Appeals reversed the Tax Court's judgment, 148 F.2d 163, and we granted certiorari because of a conflict between the decision below and that reached by the Fourth Circuit Court of Appeals in *Barnhill* v. *Commissioner*, 148 F.2d 913.

[1, 2] The portion of § 23(a)(1)(A) authorizing the deduction of "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business" is one of the specific examples given by Congress in that section of "ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." It is to be contrasted with the provision of § 24(a)(1) of the Internal Revenue Code, 25 U.S.C.A. Int. Rev. Code, § 24(a)(1), disallowing any deductions for "personal, living, or family expenses." And it is to be read in light of the interpretation given it by Sec. 19.23(a)-2 of Treasury Regulations 103, promulgated under the Internal Revenue Code. This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts,[3] is deemed to possess implied

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[2] No claim for deduction was made by the taxpayer for the amounts spent in traveling from Mobile to Jackson. He also took trips during the taxable years to Washington, New York, New Orleans, Baton Rouge, Memphis and Jackson (Tenn.), which were apparently in the nature of business trips for which the taxpayer presumably was reimbursed by the railroad. No claim was made in regard to them.

[3] Article 23(a)-2 of Regulations 101, 94, 86; Article 122 of Regulations 77 and 74; Article 102 of Regulations 69 and 65; Article 101(a) of Regulations 62.

legislative proposal and to have the effect of law. *Helvering* v. *Winmill*, 305 U.S. 79, 59 S.Ct. 45, 83 L.Ed. 52; *Bochm* v. *Commissioner*, 326 U.S. 287, 66 S.Ct. 120. In pertinent part, this interpretation states that "Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses. * * * Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted. * * * Commuters' fares are not considered as business expenses and are not deductible."

[3] Three conditions must thus be satisfied before a traveling expense deduction may be made under § 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred "while away from home."

(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

[4] Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a question of fact in most instances. See *Commissioner* v. *Heininger*, 320 U.S. 467, 475, 64 S.Ct. 249, 254, 88 L.Ed. 171. And the Tax Court's inferences and conclusions on such a factual matter, under established principles, should not be disturbed by an appellate court. *Com-*

missioner v. *Scottish American Co.*, 323 U.S. 119, 65 S.Ct. 169; *Dobson* v. *Commissioner*, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248.

In this instance, the Tax Court without detailed elaboration concluded that "The situation presented in this proceeding is, in principle, no different from that in which a taxpayer's place of employment is in one city and for reasons satisfactory to himself he resides in another." It accordingly disallowed the deductions on the ground that they represent living and personal expenses rather than traveling expenses incurred while away from him in the pursuit of business. The court below accepted the Tax Court's findings of fact but reversed its judgment on the basis that it had improperly construed the word "home" as used in the second condition precedent to a traveling expense deduction under § 23,(a)(1)(A). The Tax Court, it was said, erroneously construed the word to mean the post, station or place of business where the taxpayer was employed—in this instance, Mobile—and thus erred in concluding that the expenditures in issue were not incurred "while away from home." The Court below felt that the word was to be given no such "unusual" or "extraordinary" meaning in this statute, tht it simply meant "that place where one in fact resides" or "the principal place of abode of one who has the intention to live there permanently." 148 F.2d at page 164. Since the taxpayer here admittedly had his home, as thus defined, in Jackson and since the expenses were incurred while he was away from Jackson, the deduction was permissible.

The meaning of the word "home" in § 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Mertens, Law of Federal Income Taxation (1942) § 25.82.

The Tax Court [4] and the administrative rulings [5] have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner*, *supra*, 4 Cir. On the other hand, the decision below and *Wallace* v. *Commissioner*, 9 Cir., 144 F.2d 407, have flatly rejected that view and have confined the term to the taxpayer's actual residence. See also *Coburn* v. *Commissioner*, 2 Cir., 138 F.2d 763.

[5] We deem it unnecessary here to enter into or to decide this conflict. The Tax Court's opinion, as we read it, was grounded neither solely nor primarily upon that agency's conception of the word "home." Its discussion was directed mainly toward the relation of the expenditures to the railroad's business, a relationship required by the third condition of the deduction. Thus even if the Tax Court's definition of the word "home" was implicit in its decision and even if that definition was erroneous, its judgment must be sustained here if it properly concluded that the necessary relationship between the expenditures and the railroad's business was lacking. Failure to satisfy any one of the three conditions destroys the traveling expense deduction.

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[4] Bixler v. Commissioner, 5 B.T.A. 1181; Griesemer v. Commissioner, 10 B.T.A. 386; Brown v. Commissioner, 13 B.T.A. 832; Duncan v. Commissioner, 17 B.T.A. 1088; Peters v. Commissioner, 19 B.T.A. 901; Lindsay v. Commissioner, 34 B.T.A. 840; Powell v. Commissioner, 34 B.T.A. 655; Tracy v. Commissioner, 39 B.T.A. 578; Priddy v. Commissioner, 43 B.T.A. 18; Schurer v. Commissioner, 3 T.C. 544; Gustafson v. Commissioner, 3 T.C. 998.

[5] Section 19.23(a)-2 of Treasury Regulations 103 does not attempt to define the word "home" although the Commissioner argues that the statement therein contained to the effect that commuters' fares are not business expenses and are not deductible "necessarily rests on the premise that 'home' for tax purposes is at the locality of the taxpayer's business headquarters." Other administrative rulings have been more explicit in treating the statutory home as the abode at the taxpayer's regular post of duty. See e.g. O.D. 1021, 5 Cum. Bull. 174 (1921); I.T. 1264, I-1 Cum. Bull. 122 (1922); I.T. 3314, 1939-2 Cum. Bull. 152; G.C.M. 23672, 1943 Cum. Bull. 66.

[6] Turning our attention to the third condition, this case is disposed of quickly. There is no claim that the Tax Court misconstrued this condition or used improper standards in applying it. And it is readily apparent from the facts that its inferences were supported by evidence and that its conclusion that the expenditures in issue were non-deductible living and personal expenses were fully justified.

The facts demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad. Jackson was his regular home. Had his post of duty been in that city the cost of maintaing his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business. The character of such expenses is unaltered by the circumstance that the taxpayer's post of duty was in Mobile, thereby increasing the costs of transportation, food and lodging. Whether he maintained one abode or two, whether he traveled three blocks or three hundred miles to work, the nature of these expenditures remained the same.

The added costs in issue, moreover, were as unnecessary and inappropriate to the development of the railroad's business as were his personal and living costs in Jackson. They were incurred solely as the result of the taxpayer's desire to maintain a home in Jackson while working in Mobile, a factor irrelevant to the maintenance and prosecution of the railroad's legal business. The railroad did not require him to travel on business from Jackson to Mobile or to maintain living quarters in both cities. Nor did it compel him, save in one instance, to perform tasks for it in Jackson. It simply asked him to be at his principal post in Mobile as business demanded and as his personal convenience was served, allowing him to devide his business time between Mobile and Jackson as he saw fit. Except for the federal court litigation, all of the taxpayer's work in Jackson would normally have been performed in the headquarters at Mobile. The fact that he traveled frequently between the two cities and incurred extra living

expenses in Mobile, while doing much of his work in Jackson, was occasioned solely by his personal propensities. The railroad gained nothing from this arrangement except the personal satisfaction of the taxpayer.

[7] Travel expenses in pursuit of business within the meaning of § 23(a)(1)(A) could arise only when the railroad's business forced the taxpayer to travel and to live temporarily at some place other than Mobile, there advancing the interests of the railroad. Business trips are to be identified in relation to business demands and the traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here.

It follows that the court below erred in reversing the judgment of the Tax Court.

Reversed.

Mr. Justice JACKSON took no part in the consideration or decision of this case.

Mr. Justice RUTLEDGE, dissenting.

I think the judgment of the Court of Appeals should be affirmed. When Congress used the "home" in § 23 of the Code, I do not believe it meant "business headquarters." And in my opinion this case presents no other question.

Congress allowed the deduction for "traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business." Treasury Regulations 103, § 19.23(a)-1, are to the same effect, with the word "solely" added after "home." Section 19.23(a)-2 also provides: "Commuters' fares are not considered as business expenses and are not deductible." By this decision, the latter regulation is allowed, in effect, to swallow up the deduction for many situations where the regulation has no fit application.

Respondent's home was in Jackson, Mississippi, in every sense, unless for applying § 23. There he maintained his family, with his personal, political and religious connections; schooled his children; paid taxes, voted, and resided over many years. There too he kept hold upon his place

as a lawyer, though not substantially active in practice otherwise than to perform his work as general counsel for the railroad. This required his presence in Mobile, Alabama, for roughly a third of his time. The remainder he spent in Jackson at the same work, except for the time he was required to travel to points other than Mobile.

The company's principal offices were there, including one set aside for respondent's use. But the bulk of its trackage was in Mississippi and much of its legal work, with which he was concerned, was done there. His choice to keep his home in Jackson must have been affected by this fact, although it was motivated chiefly by more purely personal considerations. It is doubtful indeed, though perhaps not material, whether by not moving to Mobile he did not save the Government from larger deductions on account of traveling expense than those he claimed.

There is no question therefore but that respondent's home was in Jackson for every purpose, unless for the single one of applying § 23. Nor is it in doubt that he traveled from Jackson to Mobile and return, as he claimed, or that he spent the sums deducted for that purpose, including meals and lodging. Neither is it denied, as matter of fact, that his sole reason for going to Mobile was to perform his work as it required his presence there or that he returned to his home in Jackson periodically when his duties no longer required him to be in Mobile.

I think this makes a case squarely within the statute and the regulations. But the Tax Court ruled that the claimed deductions were "personal, living, or family expenses." Because the taxpayer elected to keep his home in Jackson, rather than move to Mobile, and because his employer did not undertake to pay these expenses, it viewed the case as being the same as if he had moved to Mobile. In that event, it said, he would have been required to bear the expenses of his own meals and lodging. This is obvious, even though the "as if" conclusion does not follow. The court went on, however, to give the further reason for it: "The situation * * * is, in principle, no different from that in which a taxpayer's place of employment is in one city and for rea-

sons satisfactory to himself he resides in another." It seems questionable whether, in so ruling, the Tax Court has not confused the taxpayer's principal place of employment with his employer's. For on the facts Jackson rather than Mobile would seem more appropriately to be found *his* business headquarters. But, regardless of that, the authorities cited[1] and the Government's supporting argument show that the case was regarded as in essence the commuter's, excepted by the regulations.

Apart from this ruling, the Tax Court made no finding, of fact or law, that respondent was not engaged "in the pursuit of a trade or business"; that he was not "away from home"; that the expenses were not "business expenses" or "business traveling expenses"; or that they were not "ordinary and necessary." Yet by a merry-go-round argument,[2] which always comes back to rest on the

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[1] Frank H. Sullivan, 1 B.T.A. 93; Mort L. Bixler, 5 B.T.A. 1181; Jennie A. Peters, 19 B.T.A. 901; Walter M. Priddy, 43 B.T.A. 18.

The Sullivan case illustrates the typical commuter situation. The Peters case illustrates the extension of that ruling to greater distances and irregular travel.

Recent decisions, however, where the traveling distance is great, appear to go on the theory, presented in the instant case, that the word "home" within the meaning of § 23(a) (1) means "principal place of business." See Tax Court Memorandum Opinion, Dec. 13,853(M), 1 C.C.H. Tax Serv. 1945, p. 1268. Thus, Mertens says that the disallowance of traveling expenses to one's place of business "is based primarily on the requirement that the traveling expenses include only amounts expended 'while away from home.'" 4 Mertens, Law of Federal Income Taxation, 478.

[2] Thus, the assertion that the deductions were "not even 'business' expenses" is brought back to the meaning of "home" by the given reason that "the maintenance of more than one dwelling place manifestly is not essential to the prosecution of a business." And this, in turn, completes the circle by resting on the conclusion that the taxpayer had two dwelling places, one in Mobile (presumably the hotel or hotels where he stopped) "where he resided during the periods the living expenses in question were incurred," the other in Jackson "where he resided during other periods." Likewise, the conclusion that the deductions were not "ordinary and necessary expenses," see note 8, depends on the view that Jackson was not "home" but Mobile was. So with the assertion that the "Mobile living expenses" were not "business traveling expenses."

idea that "home" means "business headquarters," the Government seeks to inject such issues and findings, including a *Dobson* v. *Com'r*, 320 U.S. 489, 64 S.Ct. 239, 88 L.Ed. 248, contention, into the Tax Court's determination. I think there was only one issue, a question of law requiring construction of the statute as to the meaning of the word "home" and, if that is resolved against the Government, the Tax Court's judgment has no other foundation on which to stand. Every other contention falls when this one does. All stand if it is valid.

I agree with the Court of Appeals that if Congress had meant "business headquarters," and not "home," it would have said "business headquarters." When it used "home" instead, I think it meant home in everyday parlance, not in some twisted special meaning of "tax home" or "tax headquarters."[3] I find no purpose stated or implied in the Act, the regulations or the legislative history to support such a distortion or to use § 23 as a lever to force people to move their homes to the locality where their employer's business headquarters may be, although their own work may be done as well in major part at home. The only stated purpose, and it is clearly stated, not in words of art, is to relieve the tax burden when one is away from home on business.

The Government relies on administrative construction, by the Commissioner and the Tax Court, and says that unless this is accepted the Act creates tax inequality. If so, it is inequality created by Congress, and it is not for the Commissioner or the Tax Court, by administrative reconstruction, to rewrite what Congress has written or to correct its views of equality. Moreover, in my opinion, the inequity, if any, comes not from the statute or the regulation but from the construction which identifies petitioner with a commuter.

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[3] Cf. Cox v. Lott, 12 Wall. 204, 20 L. Ed. 370; Addison v. Holly Hill Co., 322 U.S. 607, 617, 618, 64 S. Ct. 1215, 1221, 88 L. Ed. 1488.

That word too has limitations unless it also is made a tool for rewriting the Act. The ordinary, usual connotation, cf. 21 I.C.C. 428; *Pennsylvania R. Co.* v. *Towers*, 2[illegible] U.S. 6, 12, 38 S.Ct. 2, 4, 62 L.Ed. 117, L.R.A.1918C, 475, does not include irregular, although frequent journeys of 350 miles, requiring Pullman accommodations and some twelve to fifteen hours, one way.

Congress gave the deduction for traveling away from home on business. The commuter's case, rightly confined, does not fall in this class. One who lives in an adjacent suburb or city and by usual modes of commutation can work within a distance permitting the daily journey and return, with time for the day's work and a period at home, clearly can be excluded from the deduction on the basis of the section's terms equally with its obvious purpose. But that is not true if "commuter" is to swallow up the deduction by the same sort of construction which makes "home" mean "business headquarters" of one's employer. If the line may be extended somewhat to cover doubtful cases, it need not be lengthened to infinity or to cover cases as far removed from the prevailing connotation of commuter as this one. Including it pushes "commuting" too far, even for these times of rapid transit.[4]

Administrative construction should have some bounds. It exceeds what are legitimate when it reconstructs the statute to nullify or contradict the plain meaning of non-technical terms not artfully employed. Moreover, in this case the matter has been held in suspension by litigation

[4] Conceivably men soon may live in Florida or California and fly daily to work in New York and back. Possibly they will be regarded as commuters when that day comes. But, if so, that is not this case and, in any event, neither situation was comprehended by Congress when § 23 was enacted.

with varying results[5] and apparent qualification by the Tax Court consequent upon some of the decisions.[6]

By construing "home" as "business headquarters"; by reading "temporarily" as "very temporarily" into § 23; by bringing down "ordinary and necessary" from its first sentence into its second;[7] by finding "inequity" where Congress has said none exists; by construing "commuter" to cover long-distance, irregular travel; and by conjuring from the "statutory setting" a meaning at odds with the plain wording of the clause, the Government makes over understandable ordinary English into highly technical tax jargon. There is enough of this in the tax laws inescapably, without adding more in the absence of either compulsion or authority. The arm of the taxgatherer reaches far. In my judgment it should not go the length of this case. Congress has revised § 23 once to overcome niggardly construction.[8] It should not have to do so again.

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[5] See Wallace v. Commissioner, 9 Cir., 144 F. 2d 407; Coburn v. Commissioner, 2 Cir., 138 F. 2d 763; and the decision now in review, 5 Cir., 148 F. 2d 163, with which compare Barnhill v. Commissioner and Winborne v. Commissioner, 4 Cir., 148 F. 2d 913.

[6] See Harry F. Schurer, 3 T.C. 544; Charles G. Gustafson, 3 T.C. 998; Mortimer M. Mahony, C.C.H. Tax Ct. Serv., Dec. 14,508(M), April 10, 1945; Charles J. McLennan, C.C.H. Tax Ct. Serv., Dec. 14,644(M), June 25, 1945; Robert S. Shelley, deceased, C.C.H. Tax Ct. Serv., Dec. 15,642(M), June 25, 1945.

[7] The language is: "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *." § 23(a)(1) (1) (A), Internal Revenue Code, 26 U.S.C.A. Int. Rev. Code, § 23(a) (1) (A).

[8] The Treasury Regulations in force in 1920 allowed deduction of only the excess of the cost of meals and lodging away from home over the cost at home; and under earlier regulations none of this expense was allowed. Congress inserted the words "all" and "entire" in the 1921 Act to overcome this ruling.

Wallace v. *Commissioner of Internal Revenue* (two cases).

Nos. 10547, 10548.

Circuit Court of Appeals, Ninth Circuit.
July 17, 1944.

* * * * * * * * * *

Upon Petitions to Review Decisions of the Tax Court of the United States.

Petition by William R. Wallace, Jr., and by Ina Claire Wallace to review decisions of the Tax Court of the United States redetermining deficiences in income taxes imposed by the Commissioner of Internal Revenue.

Decisions reversed.

W. R. Wallace, Jr., of San Francisco, Cal., for petitioner Ina Claire Wallace.

W. R. Ray, of San Francisco, Cal., for petitioner W. R. Wallace, Jr.

Williamson & Wallace, of San Francisco, Cal., for petitioners.

Samuel O. Clark, Jr., Asst. U. S. Atty. Gen., and Sewall Key, Bernard Chertcoff, Robert N. Anderson, and Harry Baum, Sp. Assts. to Atty. Gen., for respondent.

Before WILBUR and GARRECHT, Circuit Judges, and McCORMICK, District Judge.

McCORMICK, District Judge.

These are two petitions for review of decisions of the Tax Court which sustained rulings of the respondent-commissioner disallowing deductions claimed by petitioners, respectively, and in consequence adjudging deficiencies against the respective petitioners in their income taxes for the year 1939.

The petitions have been consolidated and heard upon a single printed record and this opinion will suffice to determine both reviews.

The total amount of deductions in controversy, one-half of which has been claimed by each of the petitioners on his or her separate federal income tax return for the calendar year 1939, is not in dispute, nor is any question raised

as to the right of petitioners to treat combined earnings after their marriage on March 16, 1939, as community income and to file separate returns in which all proper and allowable community deductions may be separately taken by the spouses.

The contention of the commissioner, sustained by the tax court, relates solely to the household expenses of Mrs. Wallace incurred at Beverly Hills during the period from March 16, 1939, to September 15, 1939, the time when Mrs. Wallace was employed by Loew's, Inc., under the terms of a contract for her personal services as an actress.

The decisions under review, while determining under the facts that petitioners' domicile or legal residence after their marriage on March 16, 1939, was San Francisco, nevertheless substantially held that Mrs. Wallace was not "away from home in the pursuit of a trade or business" during the time that she was fulfilling her professional engagements as an actress in Hollywood from March 16, 1939 to September 15, 1939, under contract with a motion picture company. The tax court concluded that "home" as the term is used in Section 23(a)(1)[1] of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code, § 23(a)(1), means the taxpayer Mrs. Wallace's place of business, employment, or the post or station at which she was employed and that Hollywood being such place she was not away from "home" in the pursuit of business and consequently the claimed deductions for her household expenses from March 16 to September 15, 1939 were not allowable.

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[1] "Sec. 23. Deductions from gross income. * * *

"(a) Expenses. (1) In general. All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including a reasonable allowance for salaries or other compensation for personal services actually rendered; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not taken or is not taking title or in which he has no equity."

The question for decision is therefore aptly stated in the brief of respondent, as follows: "Whether taxpayers, a husband and wife, domiciled in San Francisco, California, are entitled under section 23(a)(1) of the Internal Revenue Code to deduct as traveling expenses 'while away from home' amounts expended by the wife for food, rent and similar living expenses at Hollywood, California, while she was employed there during 1939 as a motion picture actress?"

From the memorandum opinion of the Tax Court which embodies the only findings of fact in the record and from the undisputed evidence in the record before us the following pertinent factual situation is disclosed:

Petitioners are husband and wife and were married March 16, 1939. Petitioner Ina Claire Wallace is a well-known actress whose professional activities have been extensive and versatile in many plays on the "legitimate" stage and in motion pictures, both in England and in America. Petitioner William R. Wallace, Jr., is a lawyer and has lived and practiced his profession in San Francisco since the year 1927.

Upon their marriage the petitioners mutually agreed to reside at San Francisco and the domicile or legal residence of both petitioners after their marriage has been in San Francisco. Mrs. Wallace came to California from her home in New York City in November, 1938, for the purpose of professionally participating in the making of a motion picture under a written contract between herself and Loew's, Inc., dated November 18, 1938. This agreement engaged her services as a motion picture actress and her availability in performance thereof in Los Angeles at all required times over a forty-week period beginning in November, 1938, and ending in September, 1939, at compensation to be based upon her normal theatrical season's earnings and to be payable at the rate of $2,000 per week. Prior to leaving New York to fill the engagement with Loew's, Inc., Mrs. Wallace had been residing in a hotel and had also at about the same time taken a lease for three

years on a completely furnished apartment in New York City which she was getting ready to occupy when she was urged by telephone from the West Coast to accept the Loew's, Inc., engagement in California. When she left New York she definitely intended to return there and live in the furnished apartment which she had reserved at the completion of her contract with Loew's, Inc. This she never did, as her marriage completely altered her plans. Nevertheless, she kept the New York apartment for the full three-year period, subletting it for a portion of the term, which continued through the entire taxable year of 1939, and into 1942. Upon her arrival in Los Angeles to perform under the contract with Loew's, Inc., petitioner lived at a hotel for a few weeks, then moved into a house upon which she had taken a lease for three months, upon the expiration of which she moved into another residence in Beverly Hills, which before she had decided to marry Mr. Wallace she had agreed to rent from March 15, 1939 to September 15, 1939, the approximate date when it was anticipated that the motion picture in which she was to appear and which professional engagement brought her to California would be completed.

The commencement of the motion picture in which petitioner was specially engaged to appear under the contract with Loew's, Inc., was delayed until about May 1, 1939. Although the understanding was for her appearance in the specific belated picture, nevertheless, being under the contract from November, 1938, she agreed to and did work in another cinema for Loew's, Inc., for five or six weeks immediately after her arrival in California. During this period she resided in a hotel and in a house which she had rented for a definite period in Beverly Hills, California.

After their marriage in Salt Lake City, Utah, Mr. and Mrs. Wallace went to San Francisco, which city they had mutually decided to make their home, and, after a sojourn there at a hotel, they mutually established their permanent living quarters in San Francisco. Mrs. Wallace remained

with her husband until about May 1, 1939, when she returned under her contract to Los Angeles to work in the picture which had been just started. She remained there until about July 1st, returning to her husband in San Francisco where she stayed most of the month of July, then again going to Los Angeles to continue her professional commitment with Loew's, Inc., and remaining until the motion picture was finished about the first of September. She then returned to her domicile and residence in San Francisco and has continued to permanently reside there with her husband ever since, although petitioners have both been outside of the State of California on professional pursuits or business, sometimes together and sometimes separately.

Upon Mrs. Wallace's return to her home in San Francisco in May, and again in July, during breaks in her motion picture engagement, she and her husband read and studied plays and discussed them with authors and actors' agents, received her business mail, telephone calls and telegrams connected with her business and professional activities, and again after her return home on completion of her Hollywood engagement in September Mr. and Mrs. Wallace continued for the rest of the year to read and review together many stage plays that had been submitted for their approval, to consider and reject requests to "do" other motion pictures and to negotiate with persons prospective to arranging with theatrical agents and managers for a play featuring Mrs. Wallace as distinguished from a motion picture for the current theatrical season.

[1] As the decision of the Tax Court inherently involves the interpretation of terms used in a statute it presents reviewable matter in the Circuit Court of Appeals. *Dobson* v. *Commissioner*, 320 U.S. 489, 64 S.Ct. 239.

[2] Our first inquiry is to ascertain whether there is any indication of an intention by Congress to employ the expression "away from home in the pursuit of a trade or business" in the legislation under consideration other than according to the ordinary and usual meaning of the words

used. The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense that nothing but the exigency of a hard case justifies,[2] and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation. This is, in effect, what has been done by the Commissioner and sustained by the Tax Court.

We have found nothing in section 23(a)(1) of the Internal Revenue Code, 26 U.S.C.A. Int.Rev.Code § 23(a)(1) or in the earlier legislation from which this code provision is derived [3] which denotes any intent by Congress to attribute to the word "home" as therein used any unusual or novel meaning.[4]

[3] Therefore the Tax Court in its effort to differentiate between the conceded "domicile" and "legal residence" [5] of both petitioners after their marriage and their "home" at such times, has, we think, invaded the domain of Congress in construing the term "home" as used in the statute under consideration as meaning "the taxpayer's place of business, employment or the post or station at which he is employed." Had Congress intended that the word "home" should not be understood and applied in its ordinary sense but rather as meaning the locale of employment of the taxpayer, it would have used a more appropriate term to express such an intent.

[4] A home in relation to the place of abode is a dwelling place of a person, distinguished from other dwelling places of that person by the intimacy of the relation between the person and the place.[5]

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[2] Lang v. Commissioner, 289 U.S. 109, 53 S. Ct. 534, 77 L. Ed. 1066; Lynch, Executrix, etc., v. Alworth-Stephens Company, 8 Cir., 294 F. 190, affirmed 267 U.S. 364, 45 S. Ct. 274, 69 L. Ed. 660.

[3] See note of Professor Erwin N. Griswold in Vol. LVI, No. 7, Harvard Law Review, June, 1943, page 1140 et seq.

[4] Coburn v. Commissioner, 2 Cir., 138 F. 2d 763.

[5] American Law Institute, Restatement of Conflict of Laws, section 13.

[5] If the elements of this characterization of a home are applied to the habitations of the petitioners, no place, under the facts found by the Tax Court, other than New York City and San Francisco can be classified as the "home" of either of the petitioners during the calendar year 1939. Both the Commissioner and the Tax Court found that petitioner William R. Wallace, Jr., at all applicable times had his home, his residence and domicile in San Francisco, but despite the undisputed evidence of petitioner Ina Claire Wallace's retention of the living apartment in New York City and her definite intention up to the time of her marriage of returning there upon completion of her professional engagement with Loew's, Inc., and notwithstanding the uncontroverted agreement of petitioners to establish their marital home in San Francisco, and the uncontradicted evidence that petitioners lived in such home all times in the taxable year after their marriage when Mrs. Wallace was not temporarily staying in Beverly Hills and vicinity to complete the motion picture in which she was acting, the Tax Court concluded that Mrs. Wallace's home during the time she was acting in the cinema was in the vicinity of Hollywood.

Petitioner Ina Claire Wallace's relations with Hollywood and its vicinity were casual, professional and temporary. None of her private and intimate attitudes and relationships which go to make up home, as that place is ordinarily designated,[6] found lodgment there. Her physical presence and her place of abode in the vicinity of Hollywood were business necessities, and at no time did she manifest any intention or desire to remain there after completion of her work. All of her expenditures for which the deductions are claimed were allowable business expenses[7] as distinguished

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[6] "The word home denotes a merely natural and untechnical conception based upon the relation between a person's residence and his intention as to residence." Kennan on Residence and Domicile, p. 40.

[7] Section 19.23(a)-1, Treasury Regulation 103.

from personal expenses [8] and were incurred in the pursuit of and directly connected with a temporary contract of employment while she was away from her usual place of abode.

[6] The clearly expressed purpose of Congress in enacting income tax laws is to impose tax burdens upon the *net income* of individuals,[9] and in ascertaining such income when Congress has used only literal terms in specifying the allowable deductions from gross income such meaning of deductions must be accepted by the courts unless such course would lead to absurd results.[10] We can conceive of no such results by giving to the word "home" in the application of Section 23(a) (1) of the Internal Revenue Code its normal and customary meaning. On the other hand, to judicially innovate a meaning of "home" as the taxpayer's "place of business, employment, or the post or station at which he is employed," as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress [11] to tax *net* income and would in many cases tax the gross instead of the net income of individuals.[12] The court should function to interdict such a result.

In the briefs of the respective parties various decisions of the Board of Tax Appeals and other administrative agency action, are cited and discussed.[13] Petitioner con-

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[8] 26 U.S.C.A. Int. Rev Code, § 24, Section 19.24-1, Treasury Regulation 103.

[9] 26 U.S.C.A. Int. Rev. Code, § 11, 52 Stat. 452; Stewart v. Commissioner, 5 Cir., 95 F. 2d 821.

[10] See Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315, at pages 332, 333, 59 S. Ct. 191, 83 L. Ed. 195.

[11] Haggar Co. v. Helvering, 308 U.S. 389, at pages 394, 395, 60 S. Ct. 337, 84 L. Ed. 340.

[12] See 26 U.S.C.A. Int. Rev. Code, § 21, for definition of Net Income.

[13] Griesemer v. Commissioner, 10 B.T.A. 386; Brown v. Commissioner, 13 B.T.A. 832; Potter v. Commissioner, 18 B.T.A. 549; Powell v. Commissioner, 34 B.T.A. 655; Cabot v. Commissioner, Memo Decision, Docket No. 90996, 1939, 39 B.T.A. 1241; G.C.M. 7133, VIII-2, C.B. p. 85; Bixler v. Commissioner, 5 B.T.A. 1181; Duncan v. Commissioner, 17 B.T.A. 1088; Lindsay v. Commissioner, 34 B.T.A. 840; Tracy v. Commissioner, 39 B.T.A. 578; Priddy v. Commissioner, 43 B.T.A. 18.

tends that these rulings are conflicting and irreconcilable in construing the meaning of the word "home" as it is used in Section 23(a) (1) of the Internal Revenue Code and in prior revenue statutes of like import, while respondent asserts that such rulings have evolved neither conflict nor confusion in administrative action. We think it unnecessary in this review to determine whether there is any conflict in the administrative interpretations of the legislation under consideration.

The crucial question here is what is the proper construction to be given to an unambiguous income tax statute, and administrative decisions in such matters, while entitled to respect, are not binding upon the court.[14] It is noteworthy in this regard that the Board of Tax Appeals in situations similar to the one involved in this review has construed the word "home" in like income tax statutes in its usual and common meaning, and not figuratively.[15]

We conclude that the taxpayers, a husband and wife, were entitled under Section 23(a) (1) of the Internal Revenue Code to deduct as traveling expenses "while away from home" amounts expended by Mrs. Wallace for food, rent and household expenses in the vicinity of Hollywood, California, while she was employed there as a motion picture actress during the year 1939.

The decisions of the Tax Court entered May 7, 1943, being "clear-cut mistakes of law" [16] are, and each of such decisions is, reversed.

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[14] Minnesota Tea Co. v. Commissioner, etc., 8 Cir., 76 F. 2d 797, affirmed 296 U.S. 378, 56 S. Ct. 269, 80 L. Ed. 284; Biddle v. Commissioner, etc., 2 Cir., 86 F. 2d 718.

[15] Griesemer v. Commissioner, 10 B.T.A. 386; G.C.M. 7133, VIII-2, C.B. p. 85; Brown v. Commissioner, 13 B.T.A. 832.

[16] Ref. Dobson v. Commissioner, 320 U.S. 489, 64 S. Ct. 239

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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 910

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. 4a–14a) are reported at 27 T. C. 149. The opinion of the Court of Appeals (Pet. 15a–21a) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1957. By order of Mr. Justice Whittaker, the time for filing the petition for a writ of certiorari was extended to April 11, 1958. The petition was filed on April 9, 1958. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in the particular circumstances of this case, amounts expended by taxpayers for board and lodging while employed at a job site for 20½, 12½ and 8½ months, respectively, and for transportation therefrom to their family residences after termination of the employment, are deductible business expenses under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 or are nondeductible personal and living expenses under Section 24 (a) (1).

STATUTES AND REGULATIONS INVOLVED

Sections 22 (n), 23 (a), and 24 (a) of the Internal Revenue Code of 1939, and Sections 39.22 (n)–1, 39.23 (a)–1, and 39.23 (a)–2 of Treasury Regulations 118, are set forth in the Appendix, *infra,* pp. 9–12.

STATEMENT

The facts as found by the Tax Court (Pet. 5a–10a) may for present purposes be summarized as follows:

The taxpayer James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The taxpayer Stines is a journeyman plumber, and the taxpayer Hall is a welder. Since 1947 and 1952, respectively, they have been members of Local No. 725 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local unions, which send them to various work sites, some local and

some in other jurisdictions, where they are then hired by the employer. (Pet. 5a–6a.)

The taxpayer Peurifoy is unmarried. During the entire year of 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on weekends if the place of employment is within a reasonable distance. He uses his own automobile for transportation. (Pet. 6a.)

From March 10, 1952, until November 20, 1953 (20½ months), he was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. While so employed, he roomed and boarded near Kinston and from January 1, 1953, through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54. (Pet. 6a.)

Prior to his employment at Kinston, Peurifoy worked on a paper mill at Acme, North Carolina, for seven months. After his employment at Kinston, he worked at various places in North Carolina for 17½ months, three months, and two weeks, respectively, and at Barberton, Ohio, for one week. (Pet. 6a.)

In 1952 and 1953, the taxpayer Paul V. Stines and his wife maintained a residence in Raleigh, North

Carolina. His wife and their minor child actually resided there during all of 1953. (Pet. 7a.)

Since 1947, when he became a member of the union, Stines has had about 30 jobs ranging in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. (Pet. 7a.)

He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952, until about April 10, 1953 (12½ months), when he was discharged. While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended $262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles. The cost to him, under his car-pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. (Pet. 7a.)

During the remainder of 1953, Stines worked for various employers around Raleigh, plus about three weeks at Charleston, South Carolina, and 7½ weeks at Fort Bragg, North Carolina. (Pet. 7a–8a.)

The taxpayer John S. Hall and his wife have three minor children and maintained a residence in Raleigh, North Carolina, for approximately four years ending in the early part of 1954. During all of 1953, the wife and three children actually resided there. (Pet. 8a.)

From October 21, 1952, through July 10, 1953 (8½ months), Hall was employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina. He resigned for personal reasons. While work-

ing on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953, through July 10, 1953. During this time, he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. (Pet. 9a.)

Prior to his employment at Kinston in 1952, Hall was employed by the Grinnell Company to work on the Burlington Mills plant at Neuse, North Carolina, and worked at that project until it was completed in that year. After his employment at Kinston, in 1953, 1954, and 1955, he worked on a single project in Raleigh for nearly eight months; then at Portsmouth, Ohio, for about 3½ months; at Aiken, South Carolina, for about two weeks; at Hopewell, Virginia, for about seven months; at Tarboro, North Carolina, for one month; and at Moncure, North Carolina, on two successive jobs of three months each. (Pet. 9a.)

In their returns for 1953, all of the taxpayers deducted the expenses of room and board during that year at Kinston and their cost of transportation to return to their family residences at the end of the employment. The Commissioner disallowed the deductions on the ground that they were personal and living expenses. (Pet. 7a, 8a, 9a.)

The Tax Court held that the taxpayers' employment at Kinston was temporary and allowed the claimed deductions as travel expenses under Section 23 (a) (1) (A) of the Internal Revenue Code of 1939. (Pet. 10a–14a.) The Court of Appeals unanimously reversed. (Pet. 15a–21a.)

ARGUMENT

Taxpayers' assertions that the decision below presents an important question (Pet. 11–21) are premised chiefly on repeated statements that the court below based its decision on the ground that a taxpayer's "home," for the purposes of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 9), means the taxpayer's "place of employment." The holding below is not that broad.

The court expressly assumed that expenses incurred in connection with employment "away from the established tax home" are deductible if the employment is "temporary" as distinguished from "indeterminate" (Pet. 20a), but denied the claimed deductions on the ground that the Tax Court's finding that taxpayers' employment at Kinston was temporary was clearly erroneous (Pet. 21a). The effect is a holding that the place of a taxpayer's *indefinite* employment is a "home" under Section 23 (a) (1) (A), but the decision below does not present the broader question which taxpayers ask this Court to consider.

The limited nature of the holding below also precludes any conflict with the Ninth Circuit's decision in *Wallace* v. *Commissioner*, 144 F. 2d 407, principally relied upon by the taxpayers (Pet. 11–12). In *Wallace*, which has never been followed by the other courts of appeals, it was held that a movie actress domiciled in San Francisco was entitled to a deduction for the expenses she incurred in Hollywood during a six months' period while engaged in making a motion picture. The Ninth Circuit there held that "home" means domicile or legal residence, rather than

the place of employment. But the case involved "temporary" employment (p. 410).

In contrast, the decision below is based on the ground that taxpayers' employment, in the circumstances of this case, was indefinite rather than temporary. And it has been recognized for years and in numerous cases that the requirements for the deduction of travel expenses are not satisfied if a taxpayer establishes a residence for his family (or a place of business) in one locality and then goes off for an indefinite period to work in another locality. See *Barnhill* v. *Commissioner*, 148 F. 2d 913 (C. A. 4th); *Ney* v. *United States*, 171 F. 2d 449 (C. A. 8th), certiorari denied, 336 U. S. 967; *Carragan* v. *Commissioner*, 197 F. 2d 246 (C. A. 2d); *York* v. *Commissioner*, 160 F. 2d 385 (C. A. D. C.); *Milne* v. *Commissioner*, decided September 29, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,231), affirmed *per curiam*, 181 F. 2d 503 (C. A. 3d); *Carroll* v. *Commissioner*, 20 T. C. 382; *Bark* v. *Commissioner*, 6 T. C. 851; *Warren* v. *Commissioner*, 13 T. C. 205. If a taxpayer's employment at any particular place can be characterized as indefinite, that is his home for tax purposes, and his expenses are therefore not incurred while away from home. *Barnhill* v. *Commissioner, supra; Bercaw* v. *Commissioner*, 165 F. 2d 521 (C. A. 4th); *O'Toole* v. *Commissioner*, 243 F. 2d 302 (C. A. 2d); *Ney* v. *United States, supra; Carroll* v. *Commissioner, supra; Bark* v. *Commissioner, supra.*

The reasons given by taxpayers for their assertion (Pet. 12–18) that the decision below is in conflict with this Court's decision in *Commissioner* v. *Flowers*, 326

U. S. 465, are all patently without merit. In *Flowers* this Court (p. 472) expressly refrained from deciding the meaning of "home" in Section 23 (a) (1) (A).

CONCLUSION

The disposition of this case by the court below was primarily on a factual basis. The court's decision is correct, and no conflict of decisions or important question is involved. Accordingly, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. *Gross income.*

* * * * *

(n) [As added by Section 8 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—

* * * * *

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. *Deductions from gross income.*

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 24. *Items not deductible.*

(a) *General rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

SEC. 39.22 (n)–1. *Adjusted gross income.* (a) The term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under section 23 as are specified in section 22 (n). * * *

(b) Section 22 (n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstance that a particular item is specified in one of the clauses under section 22 (n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(c) The deductions specified in section 22 (n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee; (3) deductions allowable by section 23 (other than ex-

penses of travel, meals, and lodging while away from home) which consist of expenses paid or incurred in connection with the performance of services as an employee under a reimbursement or other expense-allowance arrangement with his employer; * * *

(d) For the purpose of the deductions specified in section 22 (n) the performance of personal services as an employee does not constitute the carrying on of a trade or business. * * *

* * * * *

SEC. 39.23 (a)–1. *Business expenses.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Among the items included in business expenses are * * * traveling expenses while away from home solely in the pursuit of a trade or business * * *. * * *

SEC. 39.23 (a)–2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. * * *

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

(g) A taxpayer claiming the benefit of the deductions referred to in this section must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the

taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

(h) Claim for the deductions referred to in this section must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

(i) Commuters' fares are not considered as business expenses and are not deductible.

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No. 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 910

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL,
Petitioners

v.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

REPLY BRIEF FOR PETITIONERS

ARGUMENT

Respondent concedes that the decision below rests on the doctrine that "the place of taxpayer's *indefinite* employment is a 'home' under Section 23(a)(1)(A)" of the Internal Revenue Code of 1939. (Brief for Resp., p. 6). Respondent then argues the case below

is not in conflict with the case of *Wallace* v. *Commissioner*, 144 F. 2d 407, for the reason the *Wallace* case involved "temporary" employment.

It is submitted that the case below *is* in conflict with the *Wallace* decision. In the decision below the doctrine that the "place of employment is the home of the taxpayer", or, if respondent prefers, that "the place of *indefinite* employment is the 'home' of the taxpayer" is treated as a rule of substantive law. The *Wallace* decision clearly rejected the concept that "a place of employment, indefinite or otherwise, is deemed to be the 'home' of the taxpayer" as a matter of substantive law. Respondent cites *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945) in support of its position that there is no conflict in the case below and the *Wallace* decision when this Court has itself said that the *Barnhill* case is in conflict with the *Wallace* decision. (Brief for Resp., p. 7).

Respondent dismisses petitioners' arguments that the decision below is in conflict with the decision of this Court rendered in *Commissioner* v. *Flowers*, 326 U.S. 465, by stating such arguments are "patently without merit". Respondent then adds, "In *Flowers* this Court (p. 472) expressly refrained from deciding the meaning of 'home' in Section 23(a)(1)(A)". (Brief for Resp., pp. 7-8).

Respondent's argument overlooks the fact that *it was the court below that cited the Flowers case in support of its conclusion.* A correct statement of what respondent is inadvertently saying is that the court below was *not* justified in citing the *Flowers* case in support of its conclusion for the reason that the *Flowers* case expressly refrained from deciding the meaning of "home" in Section 23(a)(1)(A), and that, accord-

ingly, the action of the court below is patently without merit to the extent it relied on the *Flowers* case in reaching its decision.

It is difficult to conceive of a more eloquent admission of the fact that the court below improperly applied the *Flowers* decision than that which respondent has made in this instance.

CONCLUSION

It is respectfully submitted that the respondent's arguments in opposition to the petition for a writ of certiorari are without merit and that the petition should be granted.

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FILED
AUG 25 1958

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IN THE

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OCTOBER TERM, 1958

No. 46

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 33-39) is reported at 254 F. 2d 483. The opinion of the Tax Court of The United States (R. 18-29) is reported at 27 T.C. 149.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1957 (R. 33). On February 10, 1958, by order of Chief Justice Earl G. Warren, the time within which to file a petition for a writ of certiorari was extended to April 11, 1958 (R. 41). The petition was filed on April 9, 1958 and was granted on May 19, 1958 (R. 42). The jurisdiction of this Court rests on

28 U.S.C. 1254(1) and 26 U.S.C. 7482(a). The time for bringing this action rests on 28 U.S.C. 2101(c) and on Rule 22(3) of the Revised Rules of The Supreme Court of The United States.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATIONS

(a) Constitution of The United States, Amendment Thirteen. (App. A, p. 1a).

(b) 44 Stat. 125, 42 U.S.C. Sec. 1994 (1952 ed.) derived from R.S. Sec. 1990. (App. A, p. 1a).

(c) Internal Revenue Code of 1939, Section 22(n), as amended by Section 8, Individual Income Tax Act of 1944, C. 210, 58 Stat. 235. (26 U.S.C. Sec. 22(n), 1952 ed.). (App. A, p. 1a).

(d) Internal Revenue Code of 1939, Section 23(a)(1)(A), as amended by Section 121(a) of Revenue Act of 1942, C. 619, 56 Stat. 819. (26 U.S.C. Sec. 23(a)(1)(A), 1952 ed.). (App. A, p. 2a).

(e) Internal Revenue Code of 1954, Section 162(a)(2), as enacted by Public Law 591, C. 736, 68A Stat. 45. (26 U.S.C. Sec. 162(a), 1952 ed., Sup. II). (App. A, p. 2a).

(f) Revenue Act of 1921, Section 214(a), C. 136, 42 Stat. 239. (App. A, p. 2a).

(g) Internal Revenue Code of 1939, Section 24(a)(1), as amended by Section 127(b) of Revenue Act of 1942, C. 619, 56 Stat. 826. (26 U.S.C. Sec. 24(a)(1), 1952 ed.). (App. A, p. 3a).

(h) Internal Revenue Code of 1954, Section 262, as enacted by Public Law 591, C. 736, 68A Stat. 76. (26 U.S.C. Sec. 262, 1952 ed., Sup. II). (App. A, p. 3a).

(i) Revenue Act of 1921, Section 215(a), C. 136, 42 Stat. 242. (App. A, p. 3a).

(j) Treasury Regulation 118, Section 39.22(n)-1, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.22(n)-1. (App. A, p. 3a).

(k) Treasury Regulation 118, Section 39.23(a)-1, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.23(a)-1. (App. A, p. 4a).

(l) Treasury Regulation 118, Section 39.23(a)-2, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.23(a)-2. (App. A, p. 4a).

(m) Treasury Regulation 103, Section 19.23(a)-2, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1940 Supp.) Section 19.23(a)-2. (App. A, p. 5a).

QUESTIONS PRESENTED

(1) Where petitioners entered upon certain construction employments away from their established residences prior to the taxable year for periods lasting approximately 20½ months, 12½ months and 8½ months, respectively, and terminated such employments during the taxable year, the question is presented as to whether or not the amounts expended during the taxable year for—

(a) board and lodging while so employed as construction workers at or near the construction site, and for

(b) transportation to return to their respective residences upon termination of such employments are nondeductible expenses within the provisions

of Section 24(a)(1) of the Internal Revenue Code of 1939, as amended.

(2) If it is determined that said expenditures are not personal within the provisions of Section 24(a)(1), the further question is presented as to whether or not the expenses in question are deductible under the provisions of Section 23(a)(1)(A) and Section 22(n) of the Internal Revenue Code of 1939, as amended.

STATEMENT

A. Prefatory

All of the petitioners herein filed timely income tax returns for the year 1953 (R. 8, 11, 15).

Petitioner Betty O. Stines did not have taxable income during the taxable year 1953 here involved. She appears as a petitioner in this proceeding as a nominal party by virtue of filing a joint income tax return with her spouse, Paul V. Stines (R. 11, 21).

Petitioner Doris D. Hall filed a separate income tax return for the year 1953 and appears as a party to this proceeding only in respect to the matter of procuring the benefits allowed a husband and wife who file a joint return. The respondent has conceded that petitioners John S. Hall and Doris D. Hall are entitled to compute their income taxes for the year 1953 under the statutory provisions pertinent to the filing of joint returns and this matter is not in issue in this proceeding (R. 24).

The term petitioners is hereinafter used to refer to the petitioners, James E. Peurifoy, Paul V. Stines and John S. Hall.

In their respective returns, each of the petitioners claimed as a deduction for travel expenses an amount

which is greater than the amount stipulated to be correct in respect to each of the petitioners (R. 25). No controversy exists as to the action of the respondent in disallowing the amounts in excess of the stipulated amounts. The issues herein are concerned only with the action of the respondent in disallowing the deductions claimed for travel expenses which were incurred in fact and which are stipulated to be correct as to their amounts.

There is no dispute over the applicability of Section 22(n) of the Internal Revenue Code of 1939. If the expenses in question are held to be deductible under the provisions of Section 23(a)(1)(A), they are deductible under the provisions of Section 22(n) relating to the determination of adjusted gross income (R. 29).

B. Judicial History of Proceedings Below

The travel expenses here in controversy were administratively disallowed by the respondent for the alleged reason that they constituted "personal and living expenses" the deduction of which is prohibited by Section 24(a)(1) of the Internal Revenue Code of 1939. Identical explanations for such action in disallowing the claimed expenses appear in each of the statutory 90 day letters sent to each of the petitioners (R. 21, 22, 23, 24).

Petitioners contested the deficiencies resulting from the disallowance of the claimed expenses and filed timely petitions in the Tax Court of The United States. The actions were consolidated for trial and after a hearing on the matter, a decision was rendered by the Tax Court of the United States under date of October 31, 1956 (R. 18). In its opinion, which was reviewed by the court without dissenting opinion, the Tax Court

sustained petitioners in their claims for the deduction of the expenses in the amounts stipulated (R. 29).

The Commissioner of Internal Revenue appealed the decision of the Tax Court to the United States Court of Appeals For The Fourth Circuit. This latter court, in its opinion entered under date of November 11, 1957, reversed the holding of the Tax Court of the United States (R. 39). The matter is now before this Court by grace of petition for a writ of certiorari granted under date of May 15, 1958 (R. 42).

C. Facts Pertinent to All Petitioners

All of the petitioners are construction workers and are employed in the heavy construction industry (R. 8, 11, 14). All of the petitioners are members of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, which is hereinafter referred to as the Union (R. 19).

Each of the petitioners obtains employment through the respective local headquarters of the Union local of which he is a member. The respective Union locals send them to various construction sites where they are then hired by representatives of the employers (R. 9, 12, 15, 16, 19). The hiring procedure consists of procuring a "referral card" from the Union local. The referral card is presented to a "job steward" at the construction site who is a union member. The job steward then takes the holder of the card to the "job superintendent" who represents the employer and by so doing "clears" the referral card holder as a duly qualified union member. The referral card holder is then "hired" by the job superintendent. The job superintendent has some discretion in hiring in that he can

refuse to hire certain persons for cause, but must eventually hire men "sponsored" by the Union. Upon termination of their respective employments at a job site, petitioners return to their local headquarters for new referrals (R. 9, 12, 15, 16).

Each of the petitioners has an established residence in which he lives and which he "owns". Petitioner Peurifoy owns his home free of debt. Petitioners Stines and Hall were purchasing their homes. In the sense described, all petitioners "owned" their homes during the entire year of 1953 (R. 8, 11, 15).

Each of the petitioners has been a member of the Union for one or more years prior to the taxable year 1953 (R. 9, 12, 16). Each of the petitioners has been employed on numerous construction sites prior to and during the taxable year in various locations in the country (R. 9, 12, 16).

A construction site is not a place of permanent employment for anyone. Upon completion of the construction, both employees and employers must seek employment elsewhere (R. 20, 37). The period of employment on some construction jobs may last for several years but normally an employment period on a construction job lasts for a few weeks or a few months. Construction employment is *certain* to terminate upon completion of the job for all construction workers. The employment of certain skills and trades are terminated prior to the completion of the construction work (R. 20, 37).

It is characteristic of the heavy construction industry that, except for certain projects adjacent to metropolitan areas, the local supply of skilled labor and artisans must be augmented by workers coming

in from other places (R. 19, 37). A customary procedure for procuring the necessary skilled workers is through the mechanism provided by the trade unions. The union locals will contact other union locals in order to procure necessary workers. In some instances the national unions will assist in procuring the necessary skilled workers (R. 19, 37).

It is apparent that workers following the heavy construction industry incur expenses for travel that would not be required by a person following the same trade in a fixed locality (Record as a whole). In the instant case, this fact was recognized by the employer of the petitioners by granting a rate of pay which was 14.8c an hour greater than the normal union scale for such work (R. 13, 16, 21).

It is customary for union construction workers to be sent to jurisdictions other than that of their union local for work. A journeyman craftsman may have several different employers in the course of a year or work at several different job sites in the course of a year (R. 19, 20).

D. Facts Pertinent to Petitioner Peurifoy

Petitioner Peurifoy is an unmarried individual and was unmarried during the entire year of 1953. He owned his residence which is located at Kure Beach, North Carolina, for the entire year of 1953. This residence was personally constructed by the petitioner and is clear of any indebtedness. Petitioner Peurifoy resides in this residence whenever employment in the vicinity permits. If his employment is not too remote he returns to this residence on week-ends (R. 8).

He is a pipe welder by trade and is a member of Local No. 329 of the Union. The headquarters of

said local is in Wilmington, North Carolina, which is approximately 20 miles from Kure Beach, North Carolina (R. 8, 9).

Petitioner Peurifoy became a member of the Union on August 13, 1951 (R. 9). His employment itinerary since August 13, 1951 until just before the time of trial in the Tax Court was as follows (R. 9, 10):

Employment Site	Starting Date	Duration
Acme, North Carolina	8/13/51	7 months
Kinston, North Carolina	3/10/52	20½ months
Mount Misery, North Carolina	11/30/53	17½ months
Cherry Point, North Carolina	5/16/55	3 months
Acme, North Carolina	Not known	2 weeks
Barberton, Ohio	10/ 3/55	1 week

The particular employment of petitioner Peurifoy involved in this proceeding is that at Kinston, North Carolina, which began on March 10, 1952 and lasted for approximately 20½ months and ended on or about November 20, 1953. While employed at or near Kinston, North Carolina, petitioner Peurifoy roomed and boarded at a boarding house located approximately one mile from the construction site. Necessary transportation for petitioner Peurifoy was provided by driving his personal automobile (R. 9, 10).

During the year 1953 petitioner Peurifoy expended the sum of $496.00 for meals and lodging in respect to his employment at Kinston, North Carolina. He expended the further sum of $8.54 for transportation in driving his car from Kinston, North Carolina, to his residence at Kure Beach, North Carolina, upon termination of such employment (R. 9, 10, 20).

These expenses in the respective amounts of $496.00 and $8.54, which have been stipulated as to said

amounts, are the expenses in controversy in this proceeding in respect to petitioner Peurifoy. (R. 25).

E. Facts Pertinent to Petitioner Stines

Petitioner Paul V. Stines and petitioner Betty O. Stines are husband and wife. They have one child who is a minor. They maintained a residence in Raleigh, North Carolina, during the entire year of 1953. They have been the owners of said residence since acquiring said residence in 1952. Betty O. Stines and their child physically resided in this residence during the entire year 1953 (R. 11, 12, 13, 14).

Petitioner Stines is a journeyman plumber by trade and is a member of Local No. 785 of the Union. The headquarters of said local is in Raleigh, North Carolina. Petitioner Stines became a member of the Union sometime in 1947. His employment itinerary since joining the Union until just before the time of trial in the Tax Court is not a matter of detailed record but includes about 30 jobs ranging in duration from two weeks to over a year (R. 21).

His employment itinerary from March 26, 1952 until just before time of trial in the Tax Court is as follows (R. 12, 13, 14):

Employment Site	Starting Date	Duration
Kinston, North Carolina	3/26/52	12½ months
Raleigh, North Carolina	4/13/53	2 weeks
Raleigh, North Carolina	5/ 6/53	6 weeks
Charleston, South Carolina	6/23/53	3 weeks
Raleigh, North Carolina	8/ 1/53	5 months
Fort Bragg, North Carolina	Not known	7½ weeks
Raleigh, North Carolina	12/ 9/53	3 weeks

Each of the above listed employments represents a different construction project even though in or near the same city. The last two employments above listed were made under conditions whereby his employer "loaned" petitioner Stines to other employers. Thus, the 7½ week period and the 3 week period of his employments were included in the 5 months period immediately preceding (R. 12, 13, 14).

The particular employment of petitioner Stines involved in this proceeding is that at Kinston, North Carolina, which began on March 26, 1952 and lasted for approximately 12½ months and ended on or about April 10, 1953. While employed at or near Kinston, North Carolina, petitioner Stines rented a room in a rooming house in Kinston, which is approximately 8 miles from the construction site, and ate his meals in restaurants. Necessary transportation for petitioner Stines was provided by a car pool arrangement with four other persons whereby each member drove his personal car for the benefit of all for approximately 1/5 of the time necessary.

During the year 1953, petitioner Stines expended the sum of $262.50 for meals and lodging in respect to his employment at Kinston, North Carolina. He expended the further sum of $1.09 for transportation costs under his car pool arrangement in returning to his residence in Raleigh, North Carolina, upon termination of such employment (R. 12, 13, 21).

These expenses in the respective amounts of $262.50 and $1.09, which have been stipulated as to said amounts, are the expenses in controversey in this proceeding in respect to petitioner Stines (R. 14, 21, 25).

In respect to his employment at Charleston, South Carolina, which began on June 23, 1953 and lasted for a period of approximately 3 weeks, petitioner Stines expended the sum of $57.00 for meals and lodging and expended the further sum of $42.00 for transportation to and from such place of employment (R. 22). These expenditures in the respective amounts of $57.00 and $42.00 have been conceded by the respondent to be properly deductible and are not in issue in this proceeding (R. 27).

In respect to his employment at Fort Bragg, North Carolina which lasted for a period of approximately 7½ weeks, petitioner Stines expended the sum of $155.63 for meals and lodging and expended the further sum of $7.00 for transportation in driving his car to and from such place of employment (R. 22). These expenditures in the respective amounts of $155.63 and $7.00 have been conceded by the respondent to be properly deductible and are not in issue in this proceeding (R. 27).

F. Facts Pertinent to Petitioner Hall

Petitioners John S. Hall and Doris D. Hall are husband and wife. They have three children, all of whom are minors. During the entire year of 1953, petitioners Hall maintained a residence in Raleigh, North Carolina. Petitioners Hall maintained said residence for approximately four years ending in the early part of 1954. Petitioners Hall were the owners of said residence in the sense that they were purchasing the residence. They sold the residence in the latter part of 1953 but continued to maintain a residence there until the early part of 1954. Doris D. Hall and their three children physically resided in said residence during the entire year 1953.

Petitioner Hall is a welder by trade and is a member of Local No. 785 of the Union. The headquarters of said local is in Raleigh, North Carolina (R. 15). Petitioner Hall joined the Union in 1951. The stipulation of facts states petitioner Hall joined the Union in 1952. This is manifestly in error as disclosed by the employment itinerary of petitioner Hall. The correct date should be 1951 (R. 16).

His employment itinerary since joining the Union until just before trial in the Tax Court is as follows (R. 16, 17, 18):

Employment Site	Starting Date	Duration
Neuse, North Carolina	Not known	1 year
Kinston, North Carolina	10/21/52	8½ months
Raleigh, North Carolina	7/13/53	7½ months
Portsmouth, Ohio	Not known	3½ months
Aiken, South Carolina	Not known	2 weeks
Hopewell, Virginia	Not known	7 months
Tarboro, North Carolina	Not known	1 month
Moncure, North Carolina	Not known	3 months
Moncure, North Carolina	Not known	3 months

The particular employment of petitioner Hall involved in this proceeding is that at Kinston, North Carolina, which began on October 21, 1952 and lasted for approximately 8½ months and ended on or about July 10, 1953. While employed at or near Kinston, North Carolina, petitioner Hall rented a room in a rooming house in Kinston which is approximately 8 miles from the construction site and ate his meals in restaurants. Petitioner Hall paid a fellow worker for transportation a flat amount of $6.50 a week which included daily round trips to the plant from the rooming house and one round trip from Raleigh, North Carolina, to Kinston, North Carolina, on week-ends (R. 16).

During the year 1953 petitioner Hall expended the sum of $530.13 for meals and lodging in respect to his employment at Kinston, North Carolina. He expended the further sum of $2.01 for transportation to return to his residence in Raleigh, North Carolina, upon termination of such employment (R. 16, 23).

These expenses in the respective amounts of $530.13 and $2.01, which have been stipulated as to said amounts, are the expenses in controversy in this proceeding in respect to petitioner Hall (R. 16, 25).

SUMMARY OF ARGUMENT

The doctrine implemented by the Court of Appeals below that a taxpayer's "home is synonymous with a place of indefinite employment" is a development of the earlier doctrine that a taxpayer's "home is synonymous with his place of employment or post of duty". Both doctrines are erroneous in that they improperly erect an evidentiary matter into positive rules of substantive law not sanctioned by the statute or by this Court in the controlling decision of *Commissioner* v. *Flowers*, 326 U.S. 465.

The doctrines were created in order to deny taxpayers a deduction for travel expenses under factual conditions whereby the taxpayers maintained their homes distant from their places of employment as a matter of "personal choice of" or as a result of the "personal propensities of" the particular taxpayer involved. This problem is properly placed under the provisions of Section 24(a)(1) of the Internal Revenue Code of 1939, not under the provisions of Section 23(a)(1) of the said code. Both doctrines are erroneous, however, in that they attempt to solve the problem

arising under Section 24(a)(1) by erecting a new rule of substantive law instead of making a simple factual determination of whether or not the expenses in question result from the "choice of" or "personal propensities of" the taxpayer. The logical starting point is to determine whether or not under *all* the facts it is reasonable to expect the taxpayer to move his home to his place of employment. A preliminary decision on this question immediately denies the deduction to the taxpayer if it *is* factually determined he is maintaining his home distant from his employment for "personal" reasons. A determination that it is *not reasonable* to expect him to move to his place of employment eliminates the "personal" aspect of the problem and clarifies the situation for a separate and independent determination of the deductibility of the expenses under the three requirements established in the statute and in the *Flowers* case.

In many lower court decisions, the courts have erroneously applied the concept of "home being synonymous with post of duty or indefinite post of duty" to the problems raised by Section 23(a)(1)(A). The result has been to develop and impose new and additional requirements for deductibility of travel expenses which are not sanctioned by the statute or by this Court. The mushrooming requirements of the technical qualifications for "temporary" employment, which has developed into a meaning of being opposed to "indefinite" employment, has acquired no less than four qualifications for "temporary" employment. The result now being that the failure of a taxpayer to meet any one of these four additional requirements will result in a denial of the deduction even though he fully meets the three requirements of the *Flowers* case and the statute.

The term "personal" has come to be loosely and improperly applied to any expenses deemed non-deductible by the Courts for any of the seven reasons now producing denial of the deduction.

This is exactly what happened in the instant case. The respondent originally disallowed the expenses for the sole reason he alleged them to be "personal and living expenses" in his statutory 90 day letters. The Tax Court determined as a question of fact that the expenses were not personal and that the three requirements of the *Flowers* case had been met. The Court of Appeals below held that the petitioners failed to meet their burden of showing the employments were *temporary,* thus concluding the expenses were not deductible, and since they were considered non-deductible, alleged such expenses were "personal". The *factual* determination of the Tax Court that the expenses were *not personal* thus remains undisturbed.

The Tax Court further determined as a conclusion of fact that the employments *were* temporary and it is submitted that this determination is correct.

It is further submitted that the Court of Appeals below was influenced in its decision in determining the employments were not temporary by the fact the petitioners on several occasions voluntarily quit their employments. A consideration of this factor in resolving the deductibility of travel expenses adversely to petitioners exercises a coercive influence in that it deters petitioners from voluntarily terminating their employment and is in contravention of the Thirteenth Amendment to the Constitution of the United States. In this respect, it is to be noted that if the decision of the Court of Appeals below is allowed to stand, it erects

a new requirement for qualification for "temporary" employment. For under the decision below petitioners apparently can not qualify for "temporary" employment if they voluntarily quit their jobs. This would raise the requirements for deductibility to eight instead of three, as established in the *Flowers* case.

ARGUMENT

I

SECTION 23(a)(1)(A) AND SECTION 24(a)(1) OF THE INTERNAL REVENUE CODE OF 1939 ARE SEPARATE AND INDEPENDENT SECTIONS WHICH REQUIRE SEPARATE AND INDEPENDENT DETERMINATIONS OF THEIR APPLICATION TO THE FACTS. THE COURT OF APPEALS BELOW ERRONEOUSLY CONCLUDED THE EXPENSES IN CONTROVERSY WERE PERSONAL UNDER SECTION 24(a)(1) AS A RESULT OF ITS ERRONEOUS DETERMINATION THAT THEY WERE NONDEDUCTIBLE UNDER SECTION 23(a)(1)(A).

The issues in this proceeding involve the interpretation and application of two sections of the Internal Revenue Code of 1939. These are Sections 24(a)(1) and 23(a)(1)(A), the provisions of which are as follows:

> "Sec. 23. *Deductions From Gross Income.*
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (a) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

"Sec. 24. *Items Not Deductible.*

(a) *General Rule.*

In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except . . ."

The language of these two sections is substantially identical with the corresponding provisions in the Internal Revenue Code of 1954. (I.R.C. of 1954, Sec. 162(a)(2) and Sec. 262). The exact language of these provisions of the Internal Revenue Code of 1954 is set forth in the appendices (App. A, pp. 2a, 3a). Accordingly, a determination of the issues in this proceeding will be applicable to the corresponding provisions of the Internal Revenue Code of 1954.

That these two provisions are separate, independent and autonomous sections of the Code seems self evident. The operation and effect of Section 24(a)(1) ought not be dependent upon Section 23(a)(1)(A). A determination that a particular expenditure is "personal" under Section 24(a)(1) should not require a reference to Section 23(a)(1)(A). There are many expenses other than travel expenses which have been judicially determined to be "personal" and hence nondeductible by direct mandate of Section 24(a)(1). (See examples in App. B, p. 5a). For purposes of determining nondeductibility under Section 24(a)(1), no reference to Section 23(a)(1)(A) is necessary or proper. Inquiry as to nondeductibility under Section 24(a)(1) is a logical condition precedent to an inquiry as to deductibility under Section 23(a)(1)(A). This is so for the reason that a determination that a particular expense is personal and therefore non-

deductible under 24(a)(1) renders further inquiry under Section 23(a)(1)(A) unnecessary and completely superfluous.

It is respectfully submitted that much of the confusion latent in this problem lies in the failure of the courts to recognize the separate and distinct application of these two sections of the code to the problem. It would seem obvious that an expense may not be "personal" as that word is used in Section 24(a)(1) and yet not be deductible under Section 23(a)(1)(A). There are many examples of such expenses (see examples in App. C, p. 6a). This approach recognizes three classes of expenditures rather than two classes as normally rationalized in respect to the problem. These classes are (1) deductible business expenditures, (2) nondeductible business expenditures and (3) nondeductible personal expenditures.

The problem of distinguishing deductible from nondeductible business expenditures is a matter falling within the orbit of Section 23(a)(1)(A). However, the matter of distinguishing business expenditures (whether deductible or nondeductible) from personal expenditures is a matter falling within the orbit of Section 24(a)(1).

In respect to the matter of resolving whether or not certain travel expenses are deductible business expenses or nondeductible business expenses, this Court in the case of *Commissioner* v. *Flowers*, 326 U.S. 465,470, laid down *three* criteria for determining such deductibility. These three criteria are substantially identical with the criteria established in Section 23(a)(1)(A) of the statute and in the regulations. It is to be noted that the language of the instant effective

regulation is substantially identical to that of the regulation in effect when this problem was considered by this Court in the *Flowers* case. (App. A, p. 5a).

In respect to the problem of resolving whether or not certain travel expenses are business (whether deductible or nondeductible) or personal, there remains the question of determining what criteria shall be used for such determination.

It is respectfully submitted that a determination of whether or not a particular travel expense is, or is not, a "personal" expense, as used in Section 24(a)(1), is primarily a question of fact. (See examples in App. B, p. 5a). Petitioners respectfully submit that the "personal" nature of a particular travel expense should be resolved in the manner employed by the Tax Court below by determining whether or not, in consideration of *all* the pertinent facts and circumstances, the taxpayer would reasonably and normally be expected to move his home to his place of employment or post of duty. (R. 27, 29). This doctrine was also recognized in the cases of *E. G. Leach*, 12 T.C. 20 (1949), and *Albert P. Tiernan*, P-H T.C. Mem. Dec., Par. 55,059 (1955).

It is further submitted that this is substantially the same concept advanced by the Supreme Court in the *Flowers* case wherein it said (326 U.S. at p. 474):

> "Travel expense in pursuit of business within the meaning of Section 23(a)(1)(A) could arise only when the railroad's business *forced* the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad." (Emphasis added).

How is one to decide when the travel is "forced" by the business or results from the "personal choice" of taxpayer in locating his home distant from his place of employment? The answer lies in *first* determining where a normal taxpayer would reasonably be expected to maintain his home in the light of all the facts.

The respondent's position, which maintains that "taxpayers' homes shift to every new place of indefinite employment", renders the meaning of the word "home" unintelligible. Taxpayer may have a home in which he and his family permanently reside and which is a "home" in every sense of the word as that word is commonly understood. Being away from this home does not satisfy the respondent. He may have a business headquarters with his union local which is recognized as a "tax home" under rulings issued by the Commissioner. (Special Letter Ruling of May 4, 1956, P-H Fed. Tax Service 1957, Par. 76,519). In the proceedings below, respondent conceded that the headquarters of the respective union locals were the "tax homes" of the petitioners. Being away from this home does not satisfy the respondent. Under respondent's theory, petitioner has a third home, which is any location at which he happens to be "indefinitely" employed. Petitioner can *never* be away from this "home" under the respondent's theory. It is submitted that such an interpretation violates the spirit and intendment of the statute.

The circumstances under which a normal man would reasonably be expected to move his home to a place of employment is a practical problem. It is not a matter of legal metaphysics. Petitioners herein are engaged in an occupation where employment is irregular and

uncertain. They travel to job sites as needed. Such factors as inclement weather, strikes, material or labor shortages may produce sudden and unforeseen termination of their employment as a normal aspect of the industry. Employment at any particular site may vary from weeks, to months, to several years. Such work, by its inherent nature, can never ripen into permanence or stability. Inevitably, the construction work is completed and both employers and employees must move to another location. Petitioners' places of employment have no stability and no permanence. The tax laws of this country should not require the constant uprooting of homes and their reestablishment at each new job site. Petitioners here only ask that they be given the same treatment employers are given when they establish homes. Petitioners have no knowledge of any cases in which the "temporary versus indefinite" concept has been applied to an employer.

Under these circumstances, any justification for asserting that a taxpayer "home is synonymous with his post of duty", temporary or otherwise, ceases to exist. A construction site is not an established place of business or employment for *anybody*. The entire operation is in a travel status.

It is submitted that under such circumstances it is not reasonable or logical to require a taxpayer to uproot an established home and move his home to a construction site. Travel expenses incurred by a taxpayer following his trade as a construction worker under these circumstances are not "personal" expenses in the sense that such expenses are occasioned by the "personal propensities" of the taxpayer as was the

situation in *Commissioner* v. *Flowers*, 326 U.S. 465. Such expenses are the natural, normal and customary expenses incurred by petitioners in following their trade and are therefore incurred in "pursuit of a trade" as those words are used in the statute and in requirement three set forth in *Commissioner* v. *Flowers*, 326 U.S. 465,470.

It is to be noted that the employments of petitioner Stines at Charleston, South Carolina, and Fort Bragg, North Carolina, in the taxable year 1953 here involved were conceded by the respondent to give rise to deductible expenses. Since petitioner Stines had been consistently following the same pattern of working and living throughout the taxable year, it would seem that the expenses incurred at the Kinston job site, which are herein in dispute, were incurred in "pursuit of his trade" to the same degree as similar expenses incurred at Charleston and Fort Bragg, which are conceded to be deductible.

This comparison again emphasizes that the conclusion of the Court of Appeals below that the expenses in dispute were "personal" is not based on a determination of fact. It is the result of the action of such court of first denying the deduction by erroneously applying the doctrine that "a place of indefinite employment is tantamount to tax home" and then classifying such expense as "personal" for the reason the court itself deemed them nondeductible.

The statutory 90 day letters, upon which jurisdiction of the proceedings in the Tax Court was based, denied the deduction to the petitioners for the reason such expenses were deemed "personal and living" expenses. The Tax Court in its opinion, and on the basis of the

facts, resolved this question favorably to the petitioners saying (R. 27):

> "In this situation we are of the opinion that when any of the petitioners accepted temporary employment away from the places of their residence, they reasonably could not have been expected to establish a residence at the places of employment. In those instances the expenses incurred at the place of employment are considered as being due to the exigencies of the trade or business."

The decision of the Court of Appeals below was based on the position that petitioners failed to meet their burden of showing that the employment was "temporary". It is submitted the facts clearly show these employments were in fact temporary as found by the Tax Court.

It is further submitted that the finding of *fact* by the Tax Court that the expenses in question were not personal *was not overruled by the Court of Appeals.* The Court of Appeals below held that the taxpayers failed to meet their burdens of showing that the employments were *temporary.* The Court of Appeals then *alleged* the expenses in question were personal. As elsewhere noted, this conclusion was *not* based on the *facts,* but resulted from the action of the Court of Appeals in denying the deduction by applying the "home is synonymous with place of indefinite employment" doctrine and then labeling such expenses "personal" because the court itself considered them nondeductible. Thus the factual determination by the Tax Court that the expenses in question were *not* personal remains undisturbed.

The confusion and complexities arising from interrelating the two sections in the manner in which it was done by the Court of Appeals below thus becomes apparent. It is submitted that a factual determination of the applicability of Section 24(a)(1) should precede a determination under Section 23(a)(1)(A). A determination that particular travel expenses are incurred as a result of the "choice of" or "personal propensities of" the taxpayer immediately resolves the problem.

A determination that particular expenses are not the result of the choice of "personal propensities" of the taxpayer *does not* dispose of the problem but clears the ground for logically applying the three requirements of the *Flowers* case.

II

THE WORD "PERSONAL" AS USED IN SECTION 24(a)(1) OF THE INTERNAL REVENUE CODE OF 1939 RAISES A PRELIMINARY QUESTION OF FACT AS WELL AS A QUESTION OF LAW. THE COURT OF APPEALS BELOW ERRONEOUSLY FAILED TO MAKE A FACTUAL DETERMINATION UNDER SECTION 24(a)(1).

In the statutory 90 day letters the respondent originally denied the deductions to the petitioners for the alleged reason that the expenses in question constituted "personal and living" expenses. The Tax Court below in its factual determination concluded that on the basis of all the facts that it was not reasonable to expect any of the instant petitioners to shift their residences to the place of employment or to regard Kinston as their "home" for tax purposes (R. 27, 29). The Court of Appeals below reversed the Tax Court, which held that the expenses in question were deductible for the alleged reason taxpayers failed to sustain their burden of proof to the effect the

work was "temporary". The Court of Appeals below *did not rule on the adequacy* of the evidence to sustain the factual determination of the Tax Court that the expenses in question were *not personal*. Thus, the factual determination of the Tax Court that the expenses here in controversy were *not* personal remains unchallenged.

The language of Section 24(a)(1) is short and would seem to be simple. It provides:

> Section 24. *Items Not Deductible.*
>
> (a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—
>
> (1) Personal, living or family expenses, except . . ."

The language of this provision has been part of the income tax laws of this country from their earliest days and remains substantially unchanged in the present Internal Revenue Code of 1954. (Sec. 215(a), Revenue Act of 1921, printed in App. A, p. 3a; Sec. 262(a), I.R.C. of 1954, printed in App. A, p. 3a).

The separate and autonomous nature of Section 24(a)(1) from Section 23(a)(1)(A) has been herein previously developed. If this position of separate and independent sections is deemed sound, it is logical that a determination of whether or not a particular expenditure is, or is not, personal be made under standards applicable solely to Section 24(a)(1). The standards and requirements erected under Section 23(a)(1)(A) logically and rightly should not be implemented when attempting to resolve the application of Section 24(a)(1).

It is respectfully submitted that the resolution of this question is primarily one of fact. As applied to the instant problem, it is further submitted that the fundamental logic of the situation dictates the obvious standard which was recognized in the opinion of the Tax Court below (R. 27, 29). The standard there employed recognizes that consideration should be given to *all* the facts and circumstances to determine whether or not a normal and reasonable man could be expected to bring his home to his place of employment. A decision of this question would immediately resolve, *on a factual basis*, whether or not the expenses were or were not "personal". A decision on this point to the effect that the expenses in question are not "personal", does *not* determine their deductibility under Section 23(a)(1)(A). This latter question logically is brought to account [illegible]t the three requirements of *Commissioner* v. *Flowers*.

A good example of travel expenditures which are not personal in fact but which are not deductible under Section 23(a)(1)(A), are those incurred by a taxpayer as a result of a housing shortage at a defense plant. The typical case is that of a taxpayer who accepted employment at a plant or installation engaged in producing war materials during World War II and was unable to find housing accommodations for his family He was forced to room and board adjacent to the job site in order to hold his job. Such employment was at a fixed plant location as distinguished from a construction site involved in this proceeding. Travel in connection with such employment was not "ordinary and necessary" to the particular employment or required by the "exigencies of the business". The expenses resulted from the exigencies of the housing

shortage, not the exigencies of the business. However, such expenses were not "personal" in the sense they were the result of the "personal choice of" or "personal propensities of" the taxpayer as was true in the *Flowers* case.

There are several cases involving the housing shortage situation. The courts have customarily denied the deduction on the grounds that the employment was "indefinite". (App. D, p. 6a). It is submitted that the existence of a housing shortage is immaterial to the issues raised by Section 23(a)(1)(A), however pertinent it may be to a determination under Section 24(a)(1) as to whether or not particular expenses were incurred because of the "personal propensities" of the taxpayer.

A classic example of the confusion resulting from injecting the housing shortage situation into the issues under Section 23(a)(1)(A) is revealed in the case of *Willard S. Jones*, 13 T.C. 880 (1949).

The facts in that case were very similar to the facts in the instant case. Petitioner was a union member and a sheet metal worker who followed the heavy construction industry. The expenses there in controversy arose out of his employment in the construction of the atomic energy plant at Oak Ridge, Tennessee. Housing facilities were not available and petitioner lived in barracks supplied for the use of the construction workers. The Tax Court denied such petitioner a deduction for expenses incurred in respect to his employment there on the grounds that such employment was "indefinite" and saying that the absence of housing accommodations would not help petitioner.

The court there utterly failed to inquire as to whether or not such expenses would have been required by the exigencies of the business irrespective of the availability of housing. Jones may not have moved to the job site if housing had been available. Development of this aspect of the case would have revealed the "ordinary and necessary" character of the expenses and their relation to the "exigencies of the business". It is to be noted that there was a vigorous dissent by Justices Murdock and Van Fossan in the *Jones* case.

The basic premise involved here is that Section 23(a)(1)(A) and Section 24(a)(1) are separate provisions requiring separate determinations of their applicability. The determination of the "personal" nature of a particular expenditure is primarily a factual determination which ought not be telescoped onto the determination as to whether the requirements of Section 23(a)(1)(A) have been met.

The customary practice of the courts of alleging that a travel expense is "personal" because the particular court deems it nondeductible is misleading and confusing. As used in Section 24(a)(1) the word "personal" creates both a question of fact and a question of law. The confusion resulting from applying the term "personal" to expenses because they are not deductible is well illustrated by the situation in respect to commuting expenses. Commuting expenses are not "personal" in the factual sense that they are incurred as a matter of "choice" or as the result of the "personal propensities" of the commuter. They are incurred as an unavoidable and necessary expense of pursuing one's work.

Commuting expenses have, nevertheless, been classified as "personal" from the earliest times. In

the case of *Frank H. Sullivan*, 1 B.T.A. 93 (1924), the court (Board of Tax Appeals) said (1 B.T.A. at p. 94):

> "The facts in this appeal differ in no respect from the case of the expenses of a commuter in traveling to and from his place of employment. The rulings of the Commissioner in such cases are consistent and of long standing to the effect that such expenses are personal and are not deductible."

A clearer understanding of the nature of commuting expenses would have resulted if such expenses had been described as "nondeductible business expenses". Such a description would not have obscured the element of choice of a taxpayer in incurring such expenses.

This improper rationale for the nondeductiblity of commuting expenses was injected into the travel expense situation in the case of *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917 (4th Cir. 1945):

> "(3, 4) . . . But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, for his own convenience, at a distance from his business. Such expenditures are not essential to the prosecution of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. This is not the same as saying that the word 'home' means 'place of business' although in most cases where deductions for traveling expenses are claimed, the result will be the same."
>
> "(5, 6) Doubtless these considerations give rise to the regulations set out above which confine the deductions for traveling expenses to those which are reasonable and necessary and expressly

> forbid the deductions of commuters' fares. *This prohibition indeed would be unauthorized if the word 'home' were given its ordinary meaning* for there can be no doubt that in a literal sense one who lives in the suburbs and does business in the city must pay travel expenses while absent from his home in the pursuit of business." (Emphasis added).

Thus the classification of commuting expenses as "personal" as above described is a legal conclusion that such expenses are nondeductible. As thus used, the term indiscriminately embraces those expenses which result from the "choice of" or "personal propensities of" the taxpayer and those which are deemed nondeductible under various legal concepts.

As previously noted, there was *no factual* determination by the Court of Appeals below that the expenses in question were "personal". There was no allegation by the Court of Appeals below that petitioners failed to carry their burden of proof of showing the expenses were *not* personal. The Court of Appeals below held that petitioners failed to carry their burden of showing the employment was "temporary". The Court of Appeals below then determined the expenses were not deductible because the places of employments were deemed to be the petitioners' "homes". The Court of Appeals below then *alleged* the expenses were "personal" for the *reason* that the Court itself had already determined them to be nondeductible.

It is submitted that this method of determining whether or not a particular expense is "personal" within the meaning of Section 24(a)(1) is improper. A simple factual determination, without reference to Section 23(a)(1)(A), under the criteria advanced,

will resolve the problem. The legal conclusion that such expense is nondeductible then attaches immediately by force of Section 24(a)(1), *if* the expense be classified as "personal" in the sense that it is incurred as the result of the "choice of" or "personal propensities of" the taxpayer.

It is further submitted that travel expenses are *not* the same thing as commuting expenses. The principle underlying the nondeductibility of commuting expenses ought not be ingrafted upon the problems involved in determining the deductibility of travel expense as was done in the *Barnhill* case.

In conclusion on this point, it is submitted that a determination of the "personal" nature of a particular travel expense should be a simple factual determination. It should not involve a determination of the distinction between deductible and nondeductible business expenses. It should not be a legal conclusion arrived at by first determining that the expense in question is not deductible under Section 23(a)(1)(A).

III

THE DECISION OF THE COURT OF APPEALS BELOW IS ERRONEOUSLY BASED ON A REQUIREMENT NOT FOUND IN THE CONTROLLING STATUTE AND NOT FOUND IN THE CONTROLLING DECISION RENDERED BY THIS COURT

The decision of the Court of Appeals below was bottomed on the doctrine that "the word home as used in Section 23(a)(1)(A) is synonymous with a place of indefinite employment". The pertinent language of the opinion below is as follows (R. 38, 39):

> ". . . If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self-employed, it is essential that the employment away from the established tax

home shall be temporary in contemplation at the time of its acceptance and not indeterminate in fact as it develops. However justified he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expenses at his post of duty is not an ordinary and necessary business expense within the meaning of Section 23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246; *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521."

The case of *Commissioner* v. *Flowers*, 326 U.S. 465, 470, set forth three requirements for the deductibility of travel expenses:

"Three conditions must be satisfied before a traveling expense deduction may be made under Section 23(a)(1)(A):

(1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.

(2) The expense must be incurred 'while away from home'.

(3) The expense must be incurred in pursuit of business. This means there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

The pertinent provision of Section 23 of the Internal Revenue Code of 1939 provides:

> Sec. 23. *Deductions From Gross Income.*
>
> In computing net income there shall be allowed as deductions:
>
> (a) *Expenses.*—
>
> (1) *Trade or business expenses.*—
>
> (A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

The provisions of the regulations are as follows (Reg. 118, Sec. 39.23; 26 C.F.R. (1953 Revision) Section 39.23):

> "Sec. 39.23(a)-2. *Traveling expenses.*
>
> (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.
>
> * * * * *
>
> (f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted."

As seen from the above, there is nothing in the statute, the regulations, or the controlling case of

Commissioner v. *Flowers* which establishes temporary employment as a condition of deductibility.

IV

THE CASES WHICH HOLD THAT "HOME IS SYNONYMOUS WITH POST OF DUTY" HAVE ERRONEOUSLY TREATED A MATTER OF EVIDENCE AS A RULE OF LAW

Since the statute, regulations and controlling Supreme Court decision manifestly do not establish "temporary" employment as a requirement of deductibility, it becomes necessary to trace the genesis and development of this doctrine in the lower court decisions.

The doctrine of "temporary versus indefinite" employment is an outgrowth of an earlier doctrine which is referred to as the "home is synonymous with place of business or post of duty" doctrine.

The "home is synonymous with place of business" doctrine was created in the important case of *Mort L. Bixler*, 5 B.T.A. 1181 (1927). This case has been cited no less than 64 times in subsequent decisions and rulings and is the foundation of the all important Fourth Circuit decision of *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945). The crucial language of the *Bixler* case appears in 5 B.T.A. at pages 1183 and 1184, and is as follows:

> ". . . Section 214(a)(1) authorizes a deduction only of *ordinary* and *necessary* expenses in carrying on any trade or business, and in this classification are included salaries paid or incurred and traveling expenses, including meals and lodging while away from home in the pursuit, or carrying on, of such trade or business. In the opinion of the Board, traveling and living expenses are deductible under the provisions of this section only

> while the taxpayer is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct and carrying on of a trade or business. A taxpayer may not keep his residence at a point where he is not engaged in carrying on a trade or business, as this petitioner testified was true in this instance, and take a deduction from gross income for his living while away from home."

The consequences of the above language have been far reaching and these words warrant the closest scrutiny. The provisions of Section 214((a)(1) of the Revenue Act of 1921, referred to in the *Bixler* case, are substantially identical to the provisions of Section 23(a)(1)(A) of the Internal Revenue Code of 1939, as amended. (See App. A, p. 2a).

It is apparent that the court in the *Bixler* case was involved with the problem of resolving the "ordinary and necessary" character of the expenditure. This was proper. However, the court denied the deduction to Bixler in the following language (p. 1183):

> ". . . In the opinion of the Board, traveling and living expenses are deductible under the provisions of this section *only while the taxpayer* is away from his place of business, employment, or the post or station at which he is employed, in the prosecution, conduct, and carrying on of a trade or business." (Emphasis added).

The quoted language goes beyond a factual determination that the expense was not ordinary and necessary and denied the deduction to Bixler by creating a rule of substantive law not found in the statute. Thus, in

the *Bixler* case, a *conclusion of fact* to the effect that the expense was not "ordinary and necessary" is not made.

The application of the doctrine that "home is synonymous with post of duty" *eliminates* the necessity of determining as a question of fact, whether or not the pertinent expenses meet any of the three requirements established in *Commissioner* v. *Flowers*, 326 U.S. 465, 470. When this doctrine is applied, petitioners *cannot* meet the statutory requirement that such expenses be incurred while working "away from home" irrespective of the *actual fact* that such expenses *are* incurred away from the home. This result is reached in square conflict with the decision of this Court in the *Flowers* case wherein it said (326 U.S. at p. 470):

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to a deduction is purely a question of fact in most instances."

The basic fallacy of the Bixler doctrine is immediately apparent upon a consideration of its application to varying fact situations. The doctrine is erected in the form of a rule of substantive law. As such, if valid, it should be of uniform application. However, if literally applied it would immediately deny a deduction for travel expenses to *every* taxpayer. A literal application of this doctrine would erase the deduction from the statute entirely. For the doctrine denies the deduction to a taxpayer because he *is* "away from home". The identical fact situation for which the statute created the deduction. Under this doctrine, a taxpayer is deemed to carry his "home" with him to his place of employment. When this doctrine is

applied, *a taxpayer cannot,* in a legal sense, meet the statutory requirement of being "away from home" irrespective of the *actual fact* that he is away from home.

The potential consequences of an unbridled application of the "home is synonymous with post of duty doctrine" have been circumvented by an equally fallacious doctrine which is discussed in succeeding sections herein and which is here described as the "home is synonymous with an indefinite post of duty" doctrine.

The doctrine launched in the *Bixler* case has been frequently followed. As previously stated, it has been cited no less than 64 times. The most important lower court decision which has followed this doctrine is in all probability the decision in the Fourth Circuit of *Barnhill* v. *Commissioner*, 148 F. 2d 913 (4th Cir. 1945). The doctrine has been a source of confusion and litigation for many years. The observation made by this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, 471 (1946), is no less true today than when made over ten years ago:

> "The meaning of the word 'home' in Section 23(a)(1)(A) with reference to a taxpayer residing in one city and working in another has engendered much difficulty and litigation. 4 Merten's Law of Federal Income Taxation (1942) Sec. 25.82. The Tax Court and the administrative rulings have consistently defined it as the equivalent of the taxpayer's place of business. See *Barnhill* v. *Commissioner, supra,* (C.C.A. 4). On the other hand, the decision below and *Wallace* v. *Commissioner*, 144 F. 2d 407 (C.C.A. 9), have flatly rejected that view and have confined the term to the taxpayer's actual residence. See

also *Coburn* v. *Commissioner*, 138 F. 2d 763 (C.C.A. 2)."

"We deem it unnecessary here to enter into or decide the conflict."

The *Barnhill* case has been frequently cited in support of the "home is synonymous with post of duty concept".

The real issue in all of the cases of this type is whether or not the expense in question is required by the business, or is the result of the personal desire, of the taxpayer to live at a distance from his work. The Court of Appeals below grappled with this very problem in the case of *Barnhill* v. *Commissioner*, 148 F. 2d 913, 917, wherein it said:

". . . But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays, which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, *for his own convenience*, at a distance from his business. Such expenditures were not essential to the prosecution of the business . . ." (Emphasis added).

Unfortunately, the Fourth Circuit did not stop with its finding of fact that such expenses were incurred as a result of the personal choice of taxpayer in maintaining his home at a place away from his place of employment. *At this point nothing further was necessary to deny the deduction as a matter of law.* The Fourth Circuit, however, made the following pronouncement which has ever since lent support to the doctrine that "home is synonymous with post of duty" (148 F. 2d at page 917):

". . . and the decision of the Tax Court *cannot* be affirmed without holding that in allowing

> deductions for traveling expenses to one who is away from home on business, the statute implies that the home and the place of business must be in the same general locality. We think that this statute *must* be given this construction and that it may be done without arbitrarily construing the word 'home' as synonymous with the term 'place of business'." (Emphasis added).

It is respectfully maintained that a *factual* finding to the effect that a taxpayer is maintaining his home distant from his place of employment as a matter of personal choice immediately resolves the issue raised by Section 24(a)(1), thereby rendering such expenses nondeductible as a matter of law under Section 24(a)(1).

In conclusion on this point, it is submitted that the doctrine that "home is synonymous with post of duty" was originally created in the *Bixler* case to deny a deduction that was not considered "ordinary and necessary" for business purposes. The *Barnhill* case also used this doctrine to deny a deduction which it considered not "necessary" for business purposes. Unfortunately, however, the application of the doctrine that "home is synonymous with place of business" has resulted in the improper denial of deductions in many instances under factual circumstances where taxpayers were clearly entitled to the deduction.

A typical case which illustrates the unfair and improper result of applying this doctrine is that of *James R. Whitaker*, 24 T.C. 750. In that case taxpayer was employed as an engineer engaged in off-shore construction in Thule, Greenland. His employer's main office was located in New York City. His family was not permitted to accompany him to Greenland. His

employer paid for or reimbursed his transportation expenses but did not reimburse him for meals and lodging on the job. His period of employment lasted 222 days. The Tax Court denied taxpayer a deduction for meals and lodging on the theory that the employment was of "indefinite" duration and hence that this taxpayer's "home" was in Thule, Greenland, for tax purposes.

There are many other cases where the results are equally unfair and improper. (See App. E, p. 8a).

It is submitted that a perspective look at the *Bixler* and the *Barnhill* cases discloses that the doctrine that "home is synonymous with post of duty" was invoked to resolve the problem of whether or not the expenses were "personal" within the meaning of Section 24(a)(1) under *factual* circumstances that warranted a determination that such expenses *were* personal. This belief stems from the following language appearing in those cases. In the *Bixler* case, 5 B.T.A., 1181, 1183, the court said:

> ". . . A taxpayer may not keep his residence at a point where he is not engaged in carrying on a trade or business, *as this petitioner testified was true in this instance*, and take a deduction from gross income for his living while away from home." (Emphasis added).

In the *Barnhill* case (148 F. 2d at p. 917) the court said:

> ". . . But it is not reasonable to suppose that Congress intended to allow as a business expense those outlays which are not caused by the exigencies of the business but by the action of the taxpayer in having his home, *for his own convenience*, at a distance from his business. Such expenditures are not essential to the prosecution

> of the business and were not within the contemplation of Congress which proceeded on the assumption that a business man would live within reasonable proximity to his business. This is not the same as saying that the word 'home' means 'place of business' although in most cases where deductions for traveling expenses are claimed, the result will be the same." (Emphasis added).

These quotations disclose that in both the *Bixler* and *Barnhill* cases that the courts were in reality resolving the issue raised by Section 24(a)(1) in applying the doctrine that "home is synonymous with post of duty". When applied to this problem there is some justification for the doctrine. It is maintained, however, that this doctrine is improper *in any case* in that it denies a deduction in the form of a rule of substantive law. A proper approach for resolving the problem of Section 24(a)(1) is a simple factual determination as to whether or not under all the circumstances a normal man could reasonably be expected to move his home to his place of employment.

The glaring fallacy in the doctrine that "home is synonymous with post of duty" is revealed by the manner in which the courts have applied it to the problems raised by Section 23(a)(1)(A). Some of the decisions which are summarized in Appendix E border on the incredible. There is no logic and no justification for its use in this manner to produce such results. The words of the statute when compared with the words in this doctrine are exact opposites. The doctrine that "home is synonymous with post of duty" reduces the simple phrase "away from home in pursuit of a trade" found in the statute to senseless jargon.

The doctrine that "home is synonymous with post of duty" is not essential to a determination of the problem. The nature and duration of the employment away from an established residence are *evidentiary facts* to be considered along with all the other pertinent facts in deciding whether or not a normal man could reasonably be expected to move his home to his place of employment. A decision of this issue does not solve the issues raised by Section 23(a)(1)(A). These latter issues are to be solved under the three requirements established by this Court in the *Flowers* case.

V

THE DOCTRINE RELIED ON BY THE COURT OF APPEALS BELOW THAT "A PLACE OF TEMPORARY EMPLOYMENT IS NOT A TAX HOME BUT THAT A PLACE OF INDEFINITE EMPLOYMENT IS A TAX HOME" IS A DEVELOPMENT OF THE DOCTRINE THAT "HOME IS SYNONYMOUS WITH POST OF DUTY". BOTH DOCTRINES ERRONEOUSLY ERECT A MATTER OF EVIDENCE INTO A RULE OF LAW

A search of the authorities to discover the inception of the "temporary versus indefinite" doctrine apparently leads to the decision of this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, 474 wherein this Court said:

> "Travel expenses in pursuit of business within the meaning of Section 23(a)(1)(A) could arise only when the railroad's business *forced* the taxpayer to travel and to live temporarily at some place other than Mobile, thereby advancing the interests of the railroad." (Emphasis added).

It seems manifest that this Court did not intend to erect a fourth requirement for deductibility under the provisions of Section 23(a)(1)(A) since the quoted language appears in the same case in which this Court has specifically established that there were *three* re-

quirements for deductibility. There is no reference to "indefinite" employment in the *Flowers* case. This suggests that this Court used the word "temporary" in its normal sense of being opposed to "permanent", rather than in the highly technical sense of being opposed to "indefinite", as that word has come to be defined in the lower court decisions. Petitioners further suggest that the quoted language constitutes an application of the *facts* to the question raised by Section 24(a)(1) as to whether or not the travel expenses in question were personal or business rather than the question raised by Section 23(a)(1)(A) as to whether or not expenses were deductible or nondeductible business expenses. As thus interpreted, the above quoted language is entirely consistent with the three requirements of deductibility established by this Court.

It is again submitted that once a factual determination is made under Section 24(a)(1) that an expense is "personal", such as was made in the *Flowers* case, the expense is immediately rendered nondeductible by force of Section 24(a)(1). Consideration of the problem under Section 23(a)(1)(A) then becomes unnecessary.

The "indefinite" concept appears to have found expression first in the case of *Arnold P. Bark*, 6 T.C. 851 (1946). The pertinent words in that opinion are as follows (6 T.C. at p. 855):

> ". . . What was originally temporary employment had by 1941 become an employment of indeterminate duration."

Since that time the doctrine has appeared in numerous court decisions (App. F, p. 11a). It is of interest to

note that the *Bark* case was decided on April 29, 1946 which was less than four months after the decision of this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, decided on January 2, 1946. The *Bark* decision cited only the *Flowers* and *Bixler* cases in support of its conclusion. It is of further interest to note that Justices Murdock, Turner and Van Fossan dissented from the decision of the Tax Court in the *Bark* case.

The doctrine came to full flower in the case of *Herman C. Ford*, P-H 1954 T.C. Mem. Dec., Par. 54,314, decided November 30, 1954, affirmed, *per curiam*, 227 F. 2d 297 (4th Cir. 1955). In that opinion the Tax Court said (P-H 1954 T.C. Mem. Dec. at page 994):

> "It is now well established that the term 'home' in Section 23(a)(1)(A) is synonymous with 'post of duty'. A taxpayer's employment may lack permanence, that is to say, it may be of an indefinite duration. But if such employment is not obviously temporary, the fact that it is of an indefinite duration does not deprive it of the status of employment at a 'post of duty'."

The above quotation constitutes a fair statement of the doctrine as it now stands in the Fourth Circuit and in the Tax Court.

It is manifest that in respect to the employments of petitioner Stines that the only difference between the employment which the Court of Appeals below considered "indefinite" and those employments of his which it considered "temporary" was the difference in the duration of such employments. The Commissioner has conceded that the employments of petitioner Stines at Charleston, South Carolina, and Fort Bragg, North

Carolina, which occurred in the same taxable year were properly deductible. There have been many cases substantially on all fours within the instant cases which have permitted the deduction (App. G, p. 12a).

It is also manifest that in the application of the "temporary versus indefinite" doctrine in this case, that the single element of the length of time of the employment period resolved the issue. Thus, once the employment is categorized as "indefinite", no factual inquiry under the three requirements of *Commissioner* v. *Flowers* is necessary *or even possible*. For by erecting "temporary" as a requirement, which the court below has defined as "not indefinite", the entire controversy is moved out of the orbit of the *Flowers* criteria and centers on the distinction between "temporary" and "indefinite" employments. Under this approach, a conclusion that the particular employment is "indefinite" immediately denies the deduction. Taxpayer *cannot* now meet the statutory requirement of being "away from home" even though he is *in fact* away from "home". This is so far the reason that the doctrine that "home is synonymous with place of indefinite employment" straps a taxpayer's home to his back, thereby disqualifying such a taxpayer under requirement two of the *Flowers* case, which provides that the expense must be incurred away from home.

This ambiguous result stem from the erroneous erection of a matter of evidence into a rule of law. The duration of the employment is but *one* fact which should be considered along with *all* the other facts in resolving the problem as required by *Commissioner* v. *Flowers*. If "temporary" employment is erected as a fourth requirement, the absurd situation results

whereby a taxpayer can meet squarely the three requirements of *Commissioner* v. *Flowers*, meet squarely the requirements of the statute, and yet be denied the deduction.

This is exactly what has happened in the instant case. If petitioner Stines met the three requirements of *Commissioner* v. *Flowers* while working at Charleston, South Carolina, and Fort Bragg, North Carolina, it stretches credulity to the breaking point to conceive how he failed to meet these requirements in respect to his employment at Kinston, North Carolina. Petitioner Stines had been consistently following a pattern of working and living and the only distinguishable difference in the employments was the length of their duration. The period of employment of petitioner Stines at Kinston was in fact shorter than other periods of employment with respect to which the courts have allowed the deduction. (App. II, p. 14a).

As would logically be expected, the shifting of the area of controversy out from under the requirements of *Commissioner* v. *Flowers* and under the "temporary versus indefinite" issue, has resulted in various additional requirements for qualification for "temporary" employment.

In the instant case the Court of Appeals below said (R. 38):

> ". . . , it is essential that the employment away from the established tax home shall be temporary *in contemplation at the time of its acceptance and not indeterminate in fact as it develops* . . ." (Emphasis added).

In the case of *Beatrice H. Albert*, 13 T.C. 129, which was referred to and distinguished in the decision of

the Tax Court below (R. 28), the Tax Court said (13 T.C. at p. 131):

> "The employment in each case lacked permanence, but on the other hand, was indefinite in duration rather than obviously temporary, *in that it was not the sort of employment in which termination within a short period could be foreseen* as was the situation in *Harry F. Schurer*, 3 T.C. 544, and *E. G. Leach*, 12 T.C. 20. *The suggestion or warning that there might be a change of station upon short notice does not justify extensive discussion* since the evidence fails to show how probable this possibility was, . . ." (Emphasis added).

In the case of *Arnold P. Bark*, 6 T.C. 851 (1946), the Tax Court denied the deduction, saying (6 T.C. at p. 855):

> ". . . Although the petitioner well understood when he accepted his first employment with the Midvale Co. that it was to be for a period of only three or four months, the situation was vastly different so far as it relates to the year 1941. *What was originally temporary employment had by 1941 become an employment of indeterminate duration.*" (Emphasis added).

The case of *Albert P. Tiernan*, P-H 1955 T.C. Mem. Dec., Par. 55,059, involved an electrical worker who was a member of a union with headquarters in Syracuse, New York. Tiernan maintained a residence in Felts Mills, New York. He worked in Schenectady, New York, from sometime in 1947 to August, 1949. He worked in Troy, New York, from August, 1949 to October, 1949. He worked in Saugerties, New York, from October, 1949 until later in 1949. He worked in Andes, New York, for the remainder of 1949. The

Tax Court there held that the employments at Troy, Saugerties, and Andes were temporary, but that the employment at Schenectady was not temporary. Tiernan had been consistently following a pattern of working and living. The only distinguishable difference in the employments was the length of their duration. The instant case is similar to the *Tiernan* case in that the duration of the employments was the determining factor in classifying the employments as not temporary (R. 27).

Thus the cited cases have established various requirements for "temporary" employment.

(1) Termination within a short and fairly definite period must be foreseeable when the employment commences.

(2) There must be some evidence to show that termination within a short period is probable.

(3) The actual time spent in such employment must be short.

(4) Employment may be temporary and become indefinite thereby losing its temporary character.

These are the four "essentials" of "temporary" employment which were successfully developed and used by the now respondent in the proceedings in the Court of Appeals below. Each of these doctrines has been successfully implemented in various cases to characterize employment as not "temporary". (App. I, p. 14a).

From the above it is apparent that the meaning of "temporary" employment is not a simple factual determination but has become a highly technical legal

concept which has developed its own requirements for qualification. The three requirements of *Commissioner* v. *Flowers* have been increased to *seven* requirements, if the doctrine that "home is synonymous with place of indefinite employment" is allowed to stand.

Thus, the consequences of erroneously erecting a matter of evidence into a rule of law become apparent. A rule of law that was originally created to deny the deduction under circumstances that were justifiable has developed into a weapon which unjustly denies the deduction to countless taxpayers. (See App. E, p. 8a). The three factual determinations required by *Commissioner* v. *Flowers* have become lost in a maze of new requirements. It is submitted that the length of the employment period is but one fact which should be considered along with *all* the other facts in determining whether or not a particular taxpayer could normally and reasonably be expected to move his home to his place of employment.

The results described have come about by the erroneous erection of a matter of evidence into a rule of law, by ingrafting this erroneous rule of law onto Section 23(a)(1)(A) when it was originally created to resolve a problem under Section 24(a)(1), and by developing a new set of requirements to meet the concept of "temporary" embodied in the erroneous rule of law.

VI

THE DECISION OF THE COURT OF APPEALS BELOW WAS ERRONEOUS IN THAT IT WAS NOT BASED ON A DETERMINATION OF FACT AS REQUIRED BY THE CONTROLLING DECISION OF COMMISSIONER v. FLOWERS

In the case of *Commissioner* v. *Flowers*, 326 U.S. 465, 470, this Court said:

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to

> a deduction is *purely a question of fact* in most instances." (Emphasis added).

It is also noted that the *Flowers* case made a *factual* determination that the expenses in question were "personal" within the meaning of Section 24(a)(1). The Court said in respect thereto (326 U.S. at p. 473):

> "The *facts* demonstrate clearly that the expenses were not incurred in the pursuit of the business of the taxpayer's employer, the railroad." (Emphasis added).

The Commissioner denied the deductions in controversy on the grounds that the expenses were "personal or living" expenses. The Tax Court determined, as a *conclusion of fact*, that such expenses were *not* personal. The Court of Appeals below did not dispute this conclusion of fact of the Tax Court. The Court of Appeals did not hold that there was a failure of proof as to any of the three requirements of the *Flowers* case. The Court of Appeals below held that there was a failure of proof to show that the work was temporary. As previously noted, temporary employment is not a requirement of deductibility. It is further submitted that there are ample facts in the record to support the conclusion of the Tax Court that the work *was* "temporary" in nature.

The Court of Appeals below *alleged* the expenses were personal saying (R. 38):

> ". . . That an employee for reasons personal to himself and his family maintains a home at a distance from his business does not serve the business of the employer and ordinarily his travel expense and the expense of his maintenance at other place is not deductible. *Commissioner* v. *Flowers*, supra.

Barnhill v. *Commissioner*, 4 Cir., 148 F. 2d 913, 159 A.L.R. 1210."

This conclusion was not based on a determination of fact but resulted from applying the doctrine that "home is synonymous with a place of indefinite employment". The determination of "personal" was thus the result of denying deductibility under Section 23(a)(1)(A). The fallacy of this conclusion is revealed by the paradoxical fact that the Court of Appeals itself *apparently admitted that on the basis of the facts the expense was not personal.* Said the Court of Appeals below. (R. 38, 39):

". . . *However justified* he may be from a subjective or personal point of view in maintaining a residence away from his post of duty, his travel and maintenance expense at his post of duty is not an ordinary and necessary expense within the meaning of Section 23(a)(1)(A) if the employment is of substantial or indefinite duration. *Commissioner* v. *Flowers*, 326 U.S. 465, 66 S. Ct. 250, 90 L. Ed. 203, *Ford* v. *Commissioner*, 4 Cir., 227 F. 2d 297, *Carragan* v. *Commissioner*, 2 Cir., 197 F. 2d 246, *Andrews* v. *Commissioner*, 4 Cir., 179 F. 2d 502; *Ney* v. *United States*, 8 Cir., 171 F. 2d 449; *Bercaw* v. *Commissioner*, 4 Cir., 165 F. 2d 521.

* * * * *

". . . *And though subjective consideration of the reasonableness of their moving their residences to their post of duty may have some bearing in determining the applicability of Sec. 24(a)(1)*, it does not establish the deductibility of maintenance expenses under Sec. 23(a)(1)(A). *Bercaw* v. *Commissioner, supra; Warren* v. *Commissioner*, 13 T.C. 205; *Whitaker* v. *Commissioner*, 24 T.C. 750." (Emphasis added).

The logical meaning of this latter quotation would clearly seem to be that the *Court of Appeals itself deemed the expenses not personal within the intendment of Section 24(a)(1) as a question of fact.* This is the exact issue on which the respondent disallowed the expenses. It now appears that both the Tax Court and the Court of Appeals below have reached the same conclusion *of fact, which is that the expenses in controversy were not personal.*

It is to be further noted that the Court of Appeals has granted the respondent a presumption to which he is not entitled. Petitioners recognize that a presumption exists that the Commissioner's determinations are correct. However, in the instant case *there was no allegation by the Commissioner that the employments were indefinite.* The Commissioner's determination was limited to the sole proposition that the expenses were "personal and living" expenses. (R. 21). The Court of Appeals below reversed the Tax Court on the basis of a failure of petitioners to carry their burden of proof to show that the work was "temporary". Said the Court of Appeals (R. 39):

> "When the taxpayers in these cases went into the Tax Court, carrying the burden of showing that the Commissioner's determination was incorrect, they produced nothing to show that their employment on the duPont project was not of indefinite duration."

The Commissioner did not determine the employments were indefinite.

This error of the Court of Appeals in thus giving the respondent a presumption of correctness in respect to an issue to which he is not entitled again illustrates

the error in erecting a matter of evidence into a rule of law. The opinion of the Court of Appeals below is not based on a factual determination as required by *Commissioner* v. *Flowers*.

Finally, it is submitted that the facts fully sustain the determination by the Tax Court that the employment was temporary in fact. There are many cases which have allowed a deduction for travel expenses under substantially identical fact situations (App. G, p. 12a).

The facts show that the taxpayers were construction workers and were engaged in construction work when the expenses in controversy were incurred. The facts further show that each of the taxpayers was employed on many and various construction projects in various locations lasting for periods varying from 1 week to 20½ months. That taxpayers entered upon the employments in question in the customary manner in which they followed their trade. The only feature which distinguishes the employments at Kinston from the other employments engaged in by the petitioners is the longer duration of such employments. The Commissioner has conceded that similar expenses incurred with respect to other employments of petitioner Stines for the taxable year are deductible. It is self evident that as regards those persons engaged in construction, for both employees and employers alike, a construction site is not a regular place of employment of anybody. And it inevitably follows, that upon completion of the construction project, all persons so engaged must seek employment elsewhere.

The facts show that the pattern of employment of all the petitioners was temporary and intermittent.

Construction work by its very nature *must* terminate in a relatively short period of time. Such factors as inclement weather, material shortages and work stoppages produce unforseen terminations of employments. Termination is not only foreseeable and probable but foreseeable and certain. Absent some extraordinary factor, it seems manifest that such employment is temporary.

VII

THE COURT OF APPEALS BELOW ERRONEOUSLY DETERMINED THAT TRAVEL EXPENSES WERE NOT DEDUCTIBLE UNLESS REQUIRED BY THE EXIGENCIES OF THE EMPLOYER'S BUSINESS

The decision of the Court of Appeals below erroneously determined that travel expenses of an employee are deductible only if incurred by the exigencies of the employer's business. In this respect the Court of Appeals below said (R. 38):

> ". . . Indeed under the rule of *Commissioner* v. *Flowers* the expense, in order to be deductible, must be 'required by the exigencies' of the employer's business, not those of the calling of the employee."

In respect to this issue this Court in *Commissioner* v. *Flowers*, 326 U.S. 465, 470 said:

> "(3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business *of the taxpayer* or of his employer." (Emphasis added).

Thus, it is apparent that it is not essential to a decision of the instant proceeding to decide whether or not the expenses were incurred in respect to the trade or business of the taxpayer or of his employer since this

Court recognizes that both classes of expenses may be deductible.

The fallacy of this position of the Court of Appeals below is further disclosed by the many cases which have allowed the deduction in substantially identical fact situations (App. G, p. 12a). Further, the respondent has conceded that the expenses of the petitioner Stines at Charleston, South Carolina, and Fort Bragg, North Carolina, were deductible. The relationship of the expenses to the employment was the same in all of these cases.

Finally, it is submitted that the position of the Court of Appeals below that the expenses were not required by the exigencies of the employer's business is subject to dispute. The facts show that heavy construction depends upon a mobile labor force. Travel by construction workers is absolutely essential to the welfare of the industry. This is conceded by the Court of Appeals below when it said (R. 37):

> ". . . It is also a characteristic of the industry, as shown in the stipulation in this case, that upon larger construction projects outside metropolitan centers, the local supply of the necessary skills *must* be greatly augmented by workers coming from other places. Work in the industry, therefore, is, to some extent, transient as well as impermanent." (Emphasis added).

VIII

IN REACHING ITS DECISION, THE COURT OF APPEALS BELOW USED AN IMPROPER FACTOR IN CONTRAVENTION OF THE THIRTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

In its opinion the court below made reference on numerous occasions to the voluntary terminations of some of the employments of the petitioners. The fre-

quency of such references creates a convincing conclusion that such voluntary terminations of their employments by the petitioners influenced the decision of the court below. The references in the opinion are as follows:

* * * * *

"... The record does not indicate whether any of these employments were terminated for cause, in consequence of completion of the work or for reasons personal to the taxpayer." (R. 34).

* * * * *

"... It is stipulated that he left this employment for personal reasons." (R. 35).

(Footnote). "Stines testified that the 'personal reason' for his leaving was that he was discharged after walking off the job during working hours to attend to a personal errand." (R. 35).

* * * * *

"... This employment began October 21, 1952, and ended on July 10, 1953, when he resigned for reasons personal to him." (R. 35).

* * * * *

"... He resigned for personal reasons from his jobs at Portsmouth, Aiken and Hopewell as well as from that at Kinston." (R. 35).

* * * * *

"... We are informed that when Stines and Hall quit their jobs at Kinston in April and July 1953, respectively, they did so for personal reasons, not because work for people of their trades was no longer available. The reason for Peurifoy's leaving in November 1953 is not mentioned." (R. 36).

The purport of the above language seems clear. The court below seeks to deny to taxpayers who quit their jobs voluntarily the status of "temporary" in respect

to such employments by concluding these employments could ripen into "indefinite" employment if petitioners had not "quit" their jobs. The result is to deny such a taxpayer a deduction to which he might otherwise be entitled because he cannot now meet the requirements of "temporary employment" which has become established in the Fourth Circuit and in the Tax Court decisions.

It is of interest to note that the Tax Court attached little or no significance to the voluntary terminations of employment of petitioners as evidenced by its conclusion and also by the fact it made but two references to such voluntary terminations in its findings of fact. (R. 22, 23).

Any doubt as to the conclusion that this factor influenced the Court of Appeals below in reaching its decision would seem to be dispelled by the following language which appears in the opinion portion of that decision (R. 39):

> ". . . It is clear that two of them left that employment for personal reasons when work was still available, while the third left after 20½ months for an undisclosed reason. *For aught that appears, work might have been available there for all three for much longer than 20½ months.*" (Emphasis added).

The final result is to apply the tax laws of the country in a manner that penalizes a taxpayer for the sole reason that he quit his job of his own volition or even because he was discharged.

Such an application of the tax laws exercises a coercive influence on a taxpayer and tends to force him to continue work against his will. Such an application

of the tax laws of this country deprives a taxpayer of a free choice in selecting his place of employment and is in contravention of the Thirteenth Amendment of the Constitution of The United States which prohibits involuntary servitude. (U.S. Const., Amend. XIII, App. A, p. 1a)

The purposes and objectives of the Thirteenth Amendment to the Constitution of The United States were set forth by this Court in the case of *Pollock* v. *Williams*, 322 U.S. 4 (1944) wherein it said (p. 17):

> "The undoubted aim of the Thirteenth Amendment as implemented by the Antipeonage Act was not merely to end slavery *but to maintain a system of completely free and voluntary labor throughout the United States.* Forced labor in some special circumstances may be consistent with the general basic system of free labor. For example, forced labor has been sustained as a means of punishing crime, and there are duties such as work on highways which society may compel. But in general the defense against oppressive hours, pay, working conditions, or treatment *is the right to change employers.*" (Emphasis added).

The Antipeonage Act is now 42 U.S.C. Sec. 1994 (App. A, p. 1a).

In this respect, it is to be noted that if the decision of the Court of Appeals below is allowed to stand, it erects a new requirement for qualification for "temporary" employment. For under the decision below petitioners apparently cannot qualify for "temporary" employment if they voluntarily quit their jobs. This would raise the requirements for deductibility to eight instead of three as established in the *Flowers* case.

CONCLUSION

From the foregoing it is respectfully submitted that the Court of Appeals below erred in the respects hereinabove indicated and erred in concluding that the expenses in controversey were not deductible.

The evils resulting from the application of the doctrine that "a taxpayer's home *shifts* to every place of indefinite employment" are far reaching. As an erroneous doctrine, it has the effect of imposing a disproportionate tax burden onto a relatively low income class of taxpayers. It results in discriminatory treatment in that the doctrine is not known to be applied to employers, but has been limited in its application to employees.

It foments unrest and labor turnover in that the doctrine encourages construction workers to prematurely quit their jobs in the hope of retaining the character of "temporary" with respect to such employment. By denying a deduction for travel expenses, it encourages workers to leave the construction industry to avoid the extra expense and seek more stable employment, thereby depriving the construction industry of a reserve mobile labor force on which it is highly dependent.

It denies a deduction to construction workers on jobs of relatively longer duration, thereby depriving such workers of a deduction when such expenses are greater and the need for such a deduction is correspondingly greater.

It denies to a construction worker the right to establish a permanent home *anywhere* for tax law purposes. It thus encourages such taxpayers to uproot established homes and become migrants. The social evils of migrant living are manifest. There is a break-

down in family living and security. Children must be untimely taken from one school and reestablished in another. Congested living conditions at a construction site are intensified and aggravated. Trailer living or shanty town dwellings become essential to survival because of sky rocketing rents. Frequently there is a breakdown of essential public services such as schools, electrical, water and police facilities at construction areas.

Such conditions are a matter of common knowledge. It is not proper that such results should be encouraged and cultivated by torturing and twisting the language of a relatively simple statute to reach a result directly opposite to the original intent of the statute.

Finally, it is submitted that meaning of the statute, as expounded under the theory that "a home shifts to a place of indefinite employment," has become a nightmarish riddle incapable of solution from the construction workers point of view. The nature of the work is such that he cannot be given any assurance of the duration of a particular employment. If he moves his family with him to avoid the extra expense, anyone of a number and unforseen factors can produce a sudden lay-off. If he leaves his family at home and the work lasts "too long", he loses his deduction for travel expenses. No one can prophesy for certainty how long a not "too long" or "temporary" job can last under the present state of the law. If he quits his job in order to keep the time "short", he loses the deduction under the rationale of the Court of Appeals below. If he continues to work, the job "becomes indefinite" and he loses the deduction. If he fails to procure evidence of the "probable short

duration" he loses the deduction even though the duration is actually "short".

It is not believed that the Congress of the United States enacted the statutes here involved with an intent to produce the results above described and which now exist as a result of decisions of the Tax Court and of the United States Court of Appeals For The Fourth Circuit. It is respectfully submitted the decision of the Court of Appeals below should be reversed.

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APPENDIX A

Constitutional Provision, Statutes and Regulations

(a) Constitution of The United States, Amendment Thirteen:

> Sec. 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

(b) 44 Stat. 125, 42 U.S.C. Sec. 1994 (1952 ed.), derived from R.S. Sec. 1990 (14 Stat. 546):

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of The United States; and all acts, laws, resolutions, orders, regulations or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

(c) Internal Revenue Code of 1939, Section 22(n), as amended by Section 8, Individual Income Tax Act of 1944, C. 210, 58 Stat. 235 (26 U.S.C. Sec. 22(n), 1952 ed):

> Sec. 22 *Gross Income.*—
>
> (n) Definition of "Adjusted Gross Income".—As used in this chapter the term "adjusted gross income" means the gross income minus—
>
> * * * * *
>
> (2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

(d) Internal Revenue Code of 1939, Section 23(a)(1)(A), as amended by Section 121 (a) of Revenue Act of 1942, C. 619, 56 Stat. 819 (26 U.S.C. Sec. 23(a)(1)(A), 1952 ed.):

Sec. 23. *Deductions from Gross Income.*

In computing net income there shall be allowed as deductions:

(a) *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or bussiness; . . ."

(e) Internal Revenue Code of 1954, Section 162(a)(2), as enacted by Public Law 591, C. 736, 68A Stat. 45 (26 U.S.C. Sec. 162(a)(2), 1952 ed., Sup. II):

Sec. 162. *Trade or Business Expenses.*

(a) *In General.*—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

* * * * *

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and"

(f) Revenue Act of 1921, Section 214(a), C. 136, 42 Stat. 239:

Sec. 214. (a). That in computing net income there shall be allowed as deductions:

(1) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade of business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . ."

(g) Internal Revenue Code of 1939, Section 24(a)(1), as amended by Section 127(b) of Revenue Act of 1942, C. 619, 56 Stat. 826 (26 U.S.C. Sec. 24(a)(1), 1952 ed.):

Sec. 24. *Items Not Deductible.*

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23(x);"

(h) Internal Revenue Code of 1954, Section 262, as enacted by Public Law 591, C. 736, 68A Stat. 76 (26 U.S.C. Sec. 262, 1952 ed., Sup. II):

Sec. 262. *Personal, Living, and Family Expenses.*

Except as otherwise expressly provided in this chapter, no deduction shall be allowed for personal, living, or family expenses.

(i) Revenue Act of 1921, Section 215(a), C. 136, 42 Stat. 242:

Sec. 215. (a). That in computing net income no deduction shall in any case be allowed in respect of—

(1) Personal, living or family expenses;

(j) Treasury Regulation 118, Section 39.22(n)-1, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.22(n)-1:

Sec. 39.22(n)-1. *Adjusted gross income.*

(a) The term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under Section 23 as are specified in section 22(n) . . .

(b) Section 22(n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstances that a particular item is specified in one of the clauses under section 22(n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(e) The deductions specified in section 22(n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee; . . .

(k) Treasury Regulations 118, Section 39.23(a)-1, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.23(a)-1:

Sec. 39.23(a)-1. *Business expenses.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. . . . Among the items included in business expenses are . . . traveling expenses while away from home solely in the pursuit of a trade or business . . .

(l) Treasury Regulation 118, Section 39.23(a)-2, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1953 Revision) Section 39.23(a)-2:

Sec. 39.23(a)-2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

(m) Treasury Regulation 103, Section 19.23(a)-2, promulgated under Internal Revenue Code of 1939, 26 C.F.R. (1940 Supp.) Section 19.23(a)-2:

Section 19.23(a)-2 *Traveling Expenses.*

Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. If the trip is undertaken for other than business purposes, the railroad fares are personal expenses and the meals and lodging are living expenses. If the trip is solely on business, the reasonable and necessary traveling expenses, including railroad fares, meals, and lodging, are business expenses.

* * * * *

(c) . . . Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

APPENDIX B

Examples of Expenses Other Than Travel Expenses Requiring a Factual Determination of Their Personal Character Under Section 24(a)(1)

(a) Medical expenses:

Vincent P. Ring, 23 T.C. 950 (1955).

In this case the court said (23 T.C. at p. 953):

". . . Whether a living expense falls within section 24(a)(1) or the exception in section 23(x) is a factual question."

(b) Entertainment expenses:

Richard A. Sutter, 21 T.C. 170 (1953).

(c) Legal expenses:

Northern Trust Co. v. *Campbell*, 211 F. 2d 251 (7th Cir. 1954).

(d) Business expenses as opposed to hobby expenses:

Coffey v. *Commissioner*, 141 F. 2d 204 (5th Cir. 1944).

APPENDIX C

Examples of Expenses Which Were Held To Be Not Deductible But Are Not Personal

(a) Nondeductible fines and penalties paid in connection with operation of a business:

Great Northern Railway Co. v. *Commissioner*, 40 F. 2d 372, 373 (8th Cir. 1930).

(b) Nondeductible unreasonable salaries paid in connection with operation of a business:

Cooke v. *Commissioner*, 203 F. 2d 258, 262 (10th Cir. 1953), *cert. denied* 346 U.S. 815 (1953).

(c) Nondeductible lobbying expenses paid in connection with operation of a business:

Textile Mills Security Corp. v. *Commissioner*, 314 U.S. 326, 337 (1941).

(d) Nondeductible expenses which frustrate public policy paid in connection with operation of a business:

Hoover Motor Express Co. v. *United States*, 356 U.S. 38 (1958).

APPENDIX D

Illustrative Cases Involving Housing Shortage Problem (Chronologically Arranged)

(a) *York* v. *Commissioner*, 160 F. 2d 385 (D.C. Cir. 1947).

Petitioner was an attorney who accepted government employment in Washington, D. C. He left his home in Atlanta in September, 1942 and could not find housing accommodations until February, 1943. Deduction denied on grounds home was deemed synonymous with place of business.

(b) *Jeter L. Bryson*, P-H T.C. Mem. Dec., Par. 48,016 (1948).

Petitioner was crane operator at shipyard during war. Housing accommodations were not available. Held, employment was indefinite.

(c) *Bercaw* v. *Commissioner*, 165 F. 2d 521 (4th Cir. 1948).

Petitioner was army officer and was given a duty assignment at Fort Meade, Maryland. There were no quarters for his family. His quarters were furnished rent free by the Army. Deductions for meals denied on grounds place of duty became his "home".

(d) *Ney* v. *United States*, 171 F. 2d 449 (4th Cir. 1948).

Petitioner accepted employment with O.P.A. in Washington, D. C. on July 1, 1942 and held this job until December 31, 1945. Housing was not available in Washington. Deduction was denied on grounds employment was indefinite.

(e) *E. G. Leach*, 12 T.C. 20 (1949).

Petitioner was a structural steel worker engaged in construction. He was away from home for 49 weeks in the taxable year on several jobs lasting from a few weeks to several months and housing accommodations were not available at the job sites. His wife and child resided at "home". Deduction was *allowed* because of "shortness and indefiniteness" of employment.

(f) *Henry C. Warren*, 13 T.C. 205 (1949).

Petitioner was a pipe fitter and worked in U. S. Navy Yard at Charleston, South Carolina for 2 years during war years. He maintained a home at Cornelia, Georgia in which his wife and children resided. Deduction was denied on grounds employment deemed indefinite.

(g) *Willard S. Jones*, 13 T.C. 880 (1949).

Petitioner was a union sheet metal worker who worked on atomic energy plant construction at Oak Ridge, Tennessee for 30 months. He maintained a home in Bakewell, Tennessee in which his wife resided. Deduction was denied on grounds employment deemed indefinite.

*(h) *A. Gilbert Formel*, P-H T.C. Mem. Dec., Par. 50,221 (1950).

Petitioner was a construction engineer sent to Russia in 1943 to help build a gasoline refinery. War restrictions prevented his family from accompanying him. He was away 2½ years. He rented an apartment for his wife and child on Long Island, New York. Deduction was denied on grounds employment deemed indefinite.

(i) *Donald B. Lipsey*, P-H T.C. Mem. Dec., Par. 52,156 (1952).

Petitioner accepted permanent employment in New York City while maintaining a home in Binghamton, New York. Housing not immediately available. Deduction denied on grounds expenses were personal.

*(j) *James R. Whitaker*, 24 T.C. 750 (1955).

Petitioner was an engineer and worked on an offshore construction project in Thule, Greenland. He was in Thule from December 15, 1951 to January 5, 1952; from April 8, 1952 to August 12, 1952; from August 29, 1952 to November 26, 1952. He returned to Thule in January, 1953 and April, 1953. He was not permitted to take his family and his destination was a military secret. Deduction denied on grounds employment deemed indefinite.

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* Indicates cases which petitioners believe were erroneously decided.

APPENDIX E

Illustrative Cases Which Have Improperly Denied Taxpayers a Deduction for Travel Expenses by Applying the Doctrine That Home Is Synonymous With a Place of Indefinite Employment (Alphabetically Arranged)

(a) *Michael J. Carroll*, 20 T.C. 382 (1953).

Petitioner was a banking and tax consultant employed by War Department to advise government of South Korea. Petitioner was in Seoul, Korea for almost a year.

(b) *Kermit L. Claunch*, 29 T.C. No. 109, appealed to 5th Cir. 7-21-58 (P-H 1958 Fed. Taxes, Par. 56,425).

Petitioner is a boilermaker. He resides at Jasper, Alabama and returns there upon completion of jobs. He worked on a construction site at Rome, Georgia from April, 1953 to April, 1955. This period of employment was twice interrupted by strikes.

(c) *Herman C. Ford*, P-H T.C. Mem. Dec., Par. 54,314 (1954), *aff'd* 227 F. 2d 297 (4th Cir. 1955).

Petitioner was a superintendent journeyman plumber. He maintained a home in Roanoke, Virginia. He has been an employer of Rust Company of Pittsburgh, Pennsylvania since 1944. He works on construction jobs all over the country whereever he is sent by his employer. Employment in controversy lasted a little over 2 years.

(d) *Wesley Hanson Harrington*, P-H T.C. Mem. Dec., Par. 53,139 (1953).

Petitioner was a field accountant on construction jobs. He worked for 25 years for same company. Length of time at any one location was 10 to 18 months. He was frequently "pulled off" jobs before their completion.

(e) *Willard S. Jones*, 13 T.C. 880 (1949).

See summary in Appendix D, p. 7a.

(f) *Winifred Kapp*, P-H T.C. Mem. Dec., Par. 58,072 (1958).

Taxpayer was a millwright. He lived in Springfield, Missouri for 17 years. He went to work for same firm in Denver, Colorado when local mill closed but did not move his home. During taxable year he worked at various company mills other than Denver as follows:

February 13, to March 3 at Wilson, Kansas
March 4 to April 12 at Hays, Kansas
April 13 to April 18 at Sterling, Colorado

May 10 to June 25 at Ft. Collins, Colorado
June 26 to July 11 at Lamar, Colorado

No travel expenses were allowed although his employer reimbursed him for expenses away from Denver.

(g) *Walter G. Pauley,* P-H T.C. Mem. Dec., Par. 54,298 (1954).

Petitioner was employed for 3 specific construction projects as a civil engineer. Jobs lasted 3 months, 1 year and 18 months, respectively. He maintained a residence in Chicago, Illinois. The job sites were in various locations in the country.

(h) *Vern Wallace Pratt,* P-H T.C. Mem. Dec., Par. 52,097 (1952).

Petitioner was a journey man plumber and a union member who followed heavy construction. He maintained a residence at Pryor, Oklahoma. The employment periods in controversy were 6 weeks and 4 months respectively.

(i) *Albert P. Tiernan,* P-H T.C. Mem. Dec., Par. 55,059 (1955).

Petitioner was union electrical worker and received employment through his union local with headquarters in Syracuse, New York. He resided with his wife and children in Felts Mills, New York. He worked in Schenectady, New York from sometime in 1947 to August, 1949. He worked in Troy, New York from August, 1949 to October 1949. He worked in Saugerties, New York from October, 1949 until later in 1949. He worked in Andes, New York for the remainder of 1949. The Court held his employments at Troy, Saugerties and Andes were temporary but his employment at Schenectady was indefinite.

(j) *James R. Whitaker,* 24 T.C. 750 (1955).

See summary in Appendix D p. 8a.

APPENDIX F

Cases Which Have Denied Taxpayers a Travel Expense Deduction on Theory Employment Was Indefinite (Chronologically Arranged)

*April 29, 1946	*Arnold P. Bark*, 6 T.C. 851, 855. (3 judges dissented).
*April 29, 1946	*S. M. R. O'Hara*, 6 T.C. 841, 845. (4 judges dissented).
February 14, 1947	*John D. Johnson*, 8 T.C. 303, 308.
December 24, 1948	*Ney* v. *United States*, 171 F. 2d 449, 453. (4th Cir.)
July 22, 1949	*Beatrice H. Albert*, 13 T.C. 129, 131.
August 12, 1949	*Henry C. Warren*, 13 T.C. 205, 208.
September 29, 1949	*Alexander Milne, Jr.*, P-H T.C. Mem. Dec., Par. 49,231 at p. 750.
*October 11, 1949	*John E. Giffels*, P-H T.C. Mem. Dec., Par. 49, 257 at p. 833.
*December 1, 1949	*Willard S. Jones*, 13 T.C. 880, 882. (2 judges dissented).
January 28, 1950	*Andrews* v. *Commissioner*, 179 F. 2d 502, 504 (4th Cir.)
*July 19, 1950	*Ralph A. Waugh*, P-H T.C. Mem. Par. 50, 175 at p. 548.
*February 27, 1952	*Conrad P. Stephan*, P-H T.C. Mem. Dec., Par. 52,050 at p. 160.
*April 16, 1953	*Albert E. Bennett*, P-H T.C. Mem. Dec., Par. 53,126 at p. 386.
*May 20, 1953	*Michael J. Carroll*, 20 T.C. 382, 384.
*October 6, 1953	*Jim McNamee*, P-H T.C. Mem. Dec., Par. 53,326 at p. 1017.
*May 17, 1954	*Walter McBreen*, P-H T.C. Mem. Dec., Par. 54,148 at p. 480.
*November 16, 1954	*Walter G. Pauly*, P-H T.C. Mem. Dec., Par. 54,298 at p. 953.
*November 30, 1954	*John J. Morley*, P-H T.C. Mem. Dec., Par. 54,311 at p. 988.

*November 30, 1954	*Herman C. Ford*, P-H T.C. Mem. Dec., Par. 54,314 at p. 994, *aff'd* 227 F. 2d 297 (4th Cir. 1955).
*March 11, 1955	*Albert P. Tiernan*, P-H T.C. Mem. Dec., Par. 55,059 at p. 162.
*July 26, 1955	*James R. Whitaker*, 24 T.C. 750, 754.
*December 31, 1956	*Arthur Kleinfelder*, P-H T.C. Mem. Dec., Par. 56,282 at p. 1199.
*May 17, 1957	*Roy J. Coffman*, P-H T.C. Mem. Dec., Par. 57,080 at p. 301.
*February 28, 1958	*Kermit L. Claunch*, 29 T.C. No. 109 at p. 6 (*appl'd* to 5th Cir. 7-21-58, 1958 P-H Fed. Taxes, Par. 56,425).
*April 24, 1958	*Winifred Kapp*, P-H, T.C. Mem. Dec., Par. 58,072 at p. 305.
*April 30, 1958	*Estil L. Cook*, P-H T.C. Mem. Dec., Par. 58,076 at p. 320.
May 29, 1958	*Leroy K. Stout*, P-H T.C. Mem. Dec., Par. 58,102 at p. 445.
June 17, 1958	*Harry Scott*, P-H T.C. Mem. Dec., Par. 58,113 at p. 529.

* Indicates cases which petitioners believe were erroneously decided.

APPENDIX G

Cases Substantially on All Fours With the Instant Case Which Have Allowed Travel Expenses as a Deduction (Chronologically Arranged)

(a) *Harry F. Schurer*, 3 T.C. 544 (1944).

Petitioner was a journeyman plumber and a union member and obtained employment through his union. He was employed on construction jobs lasting 4 weeks, 9 weeks and 33 weeks, respectively for the taxable year.

(b) *E. G. Leach*, 12 T.C. 20 (1949).

Petitioner was a structural steel construction worker. He was away for 49 weeks in taxable year on several construction jobs.

(c) *John Auer*, P-H T.C. Mem. Dec., Par. 52,335 (1952).

Petitioner was a construction mechanic for Diesel motors. Away from home 32 weeks in taxable year

(d) *Lewis F. Cooper*, P-H T.C. Mem. Dec., Par. 53,149 (1953).

Petitioner was journeyman steamfitter who obtained employment through his union. Duration of employment not stated but characterized as short and temporary.

(e) *T. G. Frazier, Jr.*, P-H T.C. Mem. Dec., Par. 53,325 (1953).

Petitioner worked on oil pipe line installations. He obtained employment through a foreman. His employments lasted 26 weeks and 8 weeks, respectively.

(f) *Jos. P. Selby*, P-H T.C. Mem. Dec., Par. 55,005 (1955).

Petitioner was accountant with construction company. His employment lasted 7 months.

(g) *Robert K. Denning*, P-H T.C. Mem. Dec., Par 55,210 (1955).

Petitioner was steamfitter who obtained his employment through his union. He worked on three different jobs lasting 3 months, 5 months and 7 weeks, respectively.

(h) *Ralph A. Stegner*, P-H T.C. Mem. Dec., Par. 55,276 (1955).

Petitioner was journeyman plumber who obtained his employment through his Union. Petitioner was continuously employed on one construction job for 55 weeks.

(i) *Albert A. Loden*, P-H T.C. Mem. Dec., Par. 56,029 (1956).

Petitioner was electrician who obtained employment through his union. His employments lasted 8 months, 4½ months and 4 months, respectively.

(j) *Peter F. Janss*, P-H T.C. Mem. Dec., Par. 57,084 (1957).

Petitioner was a construction laborer who accepted summer employments when not attending school.

APPENDIX H

Cases Which Have Allowed a Deduction for Travel Expenses for Periods of Employment Longer Than 8½ Months

(a) *Phillip D. Graham*, P-H T.C. Mem. Dec., Par. 53,206 (1953).

Petitioner was booking agent. 9½ months

(b) *Charles G. Gustafson*, 3 T.C. 998 (1944).

Petitioner was a salesman. 1 year

(c) *Special Letter Ruling of May 4, 1956*, 1956 P-H Fed. Taxes, Par. 76,519.

Applicable to construction workers. 1 year

(d) *Ralph A. Stegner*, P-H T.C. Mem. Dec., Par. 55,276 (1955).

Petitioner was journeyman plumber. 55 weeks

(e) *Chester D. Griesemer*, 10 B.T.A. 386 (1928).

Petitioner was employee sent to foreign office of his employer. 3 years

APPENDIX I

Cases Illustrating Various Theories Implemented to Characterize Employment as Not Temporary

(a) Employments held not temporary because termination within a short and fairly definite period not foreseeable:

**Albert E. Bennett*, P-H T.C. Mem. Dec., Par. 53,126 (1953).

**Herman C. Ford*, P-H T.C. Mem. Dec., Par. 54,314 (1954), *aff'd* 227 F. 2d 297 (4th Cir. 1955).

(And other cases)

(b) Employments held not temporary because of lack of evidence to show termination within a short period to be probable:

Beatrice H. Albert, 13 T.C. 129 (1949).

(c) Employments held not temporary because actual period of employment was not "short":

**Willard S. Jones*, 13 T.C. 880 (1949).
**James R. Whitaker*, 24 T.C. 750 (1955).
**Michael J. Carroll*, 20 T.C. 382 (1953).

(And other cases)

(d) Employments held not temporary because original temporary employment became indefinite:

**John E. Giffels*, P-H T.C. Mem. Dec., Par. 49,257 (1949).
**Ralph A. Waugh*, P-H T.C. Mem. Dec., Par. 50,175 (1950).

(And other cases)

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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT

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Taxpayers' expenditures for travel, meals, and lodging while employed at Kinston, their post of duty, were not incurred "while away from home" within the meaning of Section 23 (a) (1) (A) of the Internal Revenue Code of 1939, and hence do not qualify as deductible business expenses	12
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BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 18–29) are reported at 27 T. C. 149. The opinion of the Court of Appeals (R. 33–39) is reported at 254 F. 2d 483.

JURISDICTION

The judgment of the Court of Appeals was entered on November 11, 1957. (R. 40.) On February 10, 1958, by order of Mr. Chief Justice Warren, the time for filing a petition for certiorari on behalf of the taxpayers was extended to and including April 11, 1958. (R. 41.) Taxpayers' petition for certiorari was filed on April 9, 1958, and was granted on May

19, 1958. (R. 42.) The jurisdiction of this Court rests upon 28 U. S. C., Section 1254.

QUESTION PRESENTED

Whether, in the circumstances of this case, amounts expended by taxpayers for board and lodging while employed at a job site, and for transportation therefrom to their family residences after termination of the employment, are deductible business travel expenses under 23 (a) (1) (A) of the Internal Revenue Code of 1939.

STATUTE AND REGULATIONS INVOLVED

Sections 22 (n), 23 (a), and 24 (a) of the Internal Revenue Code of 1939, and Sections 39.22 (n)–1, 39.23 (a)–1 and 39.23 (a)–2 of Treasury Regulations 118, are set forth in the Appendix, *infra*, pp. 35–38.

STATEMENT

INTRODUCTION

The taxpayer James E. Peurifoy is a pipe welder. Since August 13, 1951, he has been a member of Local No. 329, with headquarters in Wilmington, North Carolina, of the trade union known as the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada. The taxpayer Stines is a journeyman plumber and the taxpayer Hall is a welder. Since 1947 and 1952, respectively, they have been members of Local No. 785 of the same union, with headquarters at Raleigh, North Carolina. They all obtain employment through their local union, which

sends them to various work sites where they are then hired by the employer. (R. 19.)

Members of local unions are often sent to other jurisdictions for work. In the case of a large project, journeymen workers, as distinguished from foremen or superintendents, may be drawn from various states. Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the necessary workers. If this does not produce sufficient workmen, the national union will procure journeymen and apprentices from all over the country. A journeymen craftsman working on construction projects may have several different employers in the course of a year or, even though he may work for one employer throughout a year, he may work at several different job sites. In the building and construction industry, some construction jobs (such as the Atomic Energy projects) may run for a period of years, but the general run of jobs is for a period of a few weeks or for a few months. (R. 19–20.)

TAXPAYER PEURIFOY

Peurifoy is, and was during the year 1953, an unmarried individual. During the entire year 1953, he owned and maintained a residence at Kure Beach, North Carolina, which is about 20 miles from Wilmington. He actually resides there when he is employed in the vicinity of Wilmington and returns to this residence on weekends if the place of employment

is within a reasonable distance. He uses his own automobile for transportation. (R. 20.)

He was first employed by the Piping Equipment Company with main offices in Greensboro, North Carolina, to work on a paper mill at Acme, North Carolina. He worked on this project from about August 13, 1951, until about March 10, 1952. (R. 20.)

He was next employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina. He worked on this project from March 10, 1952, until November 20, 1953 (20½ months). While so employed, he roomed and boarded near Kinston and from January 1, 1953, through November 20, 1953, he expended for room and board the sum of $496. The distance from his home in Kure Beach to the duPont plant is approximately 122 miles. The cost to him of driving his automobile from Kinston to Kure Beach after termination of this employment was $8.54. (R. 20.) This is the employment involved on this appeal with respect to Peurifoy.

He was next employed by the Grinnell Company to work on the Carolina Light and Power Company plant at Mount Misery, North Carolina, situated about 7 miles from Wilmington. He worked on this project from November 30, 1953, through May 14, 1955, and while he worked on this project he resided in his residence at Kure Beach. Thereafter, in 1955, he worked at Cherry Point, North Carolina, for 3 months, at Acme, North Carolina, for 2 weeks, and at Barberton, Ohio, for about one week. (R. 20.)

In his return for 1953, he deducted the amount of $1,920.80 from gross income as "Subsistence and temporary quarters necessary for earning income, not reimbursed by employer." The Commissioner disallowed the entire claimed deduction on the ground that payment thereof had not been proved and that even if paid the expenditure represented personal and living expenses. (R. 21.)

TAXPAYER STINES

Paul V. Stines and Betty O. Stines are husband and wife. Betty O. Stines appears as a taxpayer by virtue of having joined in the filing of the income tax return for 1953. During the entire year 1953, they maintained a residence in Raleigh, North Carolina, and had maintained such residence since sometime in 1952. Betty O. Stines and the taxpayers' minor child actually resided in such residence during the entire year 1953. (R. 21.)

Since 1947, when he became a member of the union, the taxpayer Paul V. Stines has had about 30 jobs ranging in duration from two weeks to over a year. He worked for one employer for over two years but on different jobs in different locations. He was employed by the Grinnell Company of Charlotte, North Carolina, to work on the duPont plant at Kinston, North Carolina, from March 26, 1952, until about April 10, 1953 (12½ months), when he left for "personal reasons." (R. 12.) While so employed, he rented a room at Kinston, North Carolina, and ate his meals in restaurants. During 1953 he expended

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$262.50 for room and board. The distance from Raleigh to Kinston by automobile is approximately 78 miles and the distance from Kinston to the plant site is approximately an additional 8 miles. He drove his car or rode with others from his residence in Raleigh to his rooming house in Kinston and returned once a week. The cost to him, under his car-pool arrangement, for transportation from Kinston to Raleigh upon termination of his work in Kinston was $1.09. While employed at Kinston he received 14.8 cents per hour greater than the normal union scale in accordance with the agreement between the Grinnell Company and the union. All union employees received this additional amount regardless of where they were living. This extra amount was intended to compensate the employees for time expended in going from the town of Kinston to the job site and return. (R. 21.) This is the employment involved on this appeal with respect to Stines.

He was next employed by Carl B. Mims of Raleigh from about April 13, 1953, to about April 28, 1953, to work in and around the environs of Raleigh. (R. 22.)

He then worked for A. L. Wright and Company, Inc., of Portsmouth, Virginia, from about May 6, 1953, to about June 23, 1953, when he quit for personal reasons. This work was performed on the Westinghouse plant near Raleigh. (R. 22.)

His next employment was with Markowitz Brothers, Inc., of Miami, Florida, to work on an airbase near Charleston, South Carolina. He worked there from about June 23, 1953, to about July 15, 1953. (R. 22.)

He was next employed by Biemann and Rowell of Raleigh, North Carolina, from August 1, 1953, through December 31, 1953. While so employed he was loaned by his employer to Garrison and Hopkins Company, Inc., of Charlotte, North Carolina, to work on the S. H. Kress Company job in Raleigh, and to Cooper and Goodwin of Raleigh to work from December 9, 1953, through December 30, 1953, in and around the environs of Raleigh. He also worked for Garrison and Hopkins Company, Inc., at Fort Bragg, North Carolina, for approximately 7½ weeks during 1953 (R. 22.)

In their return for the year 1953, the taxpayers Paul V. and Betty O. Stines deducted the amount of $2,480 from gross income for "Subsistence and quarter [*sic*] non reimbursable by employer necessary to earning income." The Commissioner disallowed the deduction for the same reasons as in the case of the taxpayer Peurifoy. (R. 22.)

TAXPAYER HALL

John S. Hall and Doris D. Hall are husband and wife. They have three minor children. During the entire year 1953 they maintained a residence in Raleigh, North Carolina. They maintained such residence for approximately 4 years ending in the early part of 1954. Doris D. Hall and the three children actually resided there during the entire year 1953. (R. 23.)

The taxpayer John S. Hall was first employed in 1952 by the Grinnell Company of Charlotte, North Carolina, to work on the Burlington Mills plant at

Neuse, North Carolina, and worked on this project until it was completed in that year. (R. 23.)

He was next employed by the Grinnell Company to work on the duPont plant at Kinston, North Carolina, and worked on this project from October 21, 1952, through July 10, 1953 (8½ months). He resigned for "personal reasons." (R. 16.) While working on the duPont plant at Kinston, he expended $530.13 for room and board during the period January 1, 1953, through July 10, 1953. During this time he returned to Raleigh on weekends. The cost to him of his transportation from Kinston to Raleigh after termination of his employment was $2.01. While he was employed on this project, he received 14.8 cents per hour greater than the normal union scale (see *supra*, p. 6). (R. 23.) This is the employment involved on this appeal with respect to Hall.

He was next employed by A. L. Wright and Company, Inc., of Portsmouth, Virginia, to work on the Westinghouse plant under construction in Raleigh. He worked on this project from July 13, 1953, until the project was completed on March 5, 1954. (R. 23.)

Thereafter, in 1954 and 1955, he worked at Portsmouth, Ohio, for about 3½ months; at Aiken, South Carolina, for about two weeks; at Hopewell, Virginia, for about seven months; at Tarboro, North Carolina, for one month; and at Moncure, North Carolina, on two successive jobs of three months each. (R. 23.)

The taxpayers John S. Hall and Doris D. Hall filed separate individual income tax returns for the year 1953. In his return for 1953, the taxpayer John S. Hall deducted from gross income the amount of

$1,556.60 as "Subsistence and quarters nonreimbursable by employer necessary to earning income." The Commissioner disallowed the claimed deduction of $1,556.60 for the same reasons as in the case of the other taxpayers herein. (R. 23–24.)

PROCEEDINGS BELOW

The Tax Court sustained the claimed deductions. The Tax Court held that the taxpayers' employment at Kinston was "temporary," and that therefore their expenditures for food and lodging while engaged in work there and for transportation therefrom to their residences upon termination of the employment were incurred "while away from home" within the meaning of Section 23 (a) (1) (A). (R. 24, 29.)

The Government appealed to the Court of Appeals for the Fourth Circuit on the factual issue of whether the Tax Court erred in finding that taxpayers' employment at Kinston was temporary. The Government contended that the taxpayers had failed to meet their burden of proof on that issue, even assuming that the taxpayers would otherwise qualify for the deduction. The Court of Appeals agreed with this contention, held that the Tax Court's finding that the work was temporary was clearly erroneous (Rule 52 (a), F. R. Civ. P.), and accordingly reversed the Tax Court's judgment. (R. 39.)

SUMMARY OF ARGUMENT

Section 23 (a) (1) (A) of the Internal Revenue Code of 1939 authorizes the deduction of all the ordinary and necessary expenses paid or incurred during

the taxable year in carrying on any trade or business, including traveling expenses "while away from home" in the pursuit of a trade or business. *Commissioner* v. *Flowers*, 326 U. S. 465. In the Commissioner's view, the taxpayers here are not entitled to the deductions claimed as travel expenses because they were not incurred "while away from home."

A

1. The administrative rulings and the decisions of the Tax Court have uniformly held for years that "home" within the meaning of the statute means a taxpayer's abode at his regular post of duty, and hence only when a taxpayer is away from there is he entitled to the travel expense deduction. Several courts of appeals have recently so held also, and none since this Court's *Flowers* decision has held that "home" can be anywhere else other than at taxpayer's regular post of duty, even though he and his family may actually reside somewhere other than in the area of his post of duty.

Logic as well as authority requires this definition of "home." All taxpayers engaged in trade or business must incur living expenses for food and lodging, wherever they may keep their living quarters, and Section 24 denies the deduction of such personal expenses "in any case." The patent objective of Section 23 (a) (1) (A) is to extend relief to a taxpayer who in pursuit of his trade or business must travel temporarily or intermittently away from the locality which is his regular post of duty. The view that "home" must be read literally as the place where

taxpayer may choose to reside, irrespective of the location of his post of duty, would produce the incongruous result that subsistence and commuting expenses would remain nondeductible under Section 24 if the taxpayer had his living quarters in the locality of his post of duty, but would be transformed into deductible business traveling expenses under Section 23 if he chose to maintain, in addition to living quarters in the neighborhood of his business, separate living quarters elsewhere which he regarded as his residence. Such a view finds no support in the language or legislative history of the statute.

2. If the deductibility of taxpayers' expenditures while employed at Kinston is governed by the general rule that an employee's post of duty is his tax "home", it necessarily follows that the expenditures are nondeductible since Kinston was plainly their post of duty. Upon the general rule, however, has been engrafted an exception which the Tax Court applied in the instant case. The Tax Court held that taxpayers' employment at Kinston was only temporary, as distinguished from indefinite or indeterminate, and that they therefore were entitled to the travel expense deduction because their family residences were located elsewhere. In effect, the Tax Court held that a taxpayer's post of duty is his tax home except when that post of duty is temporary, in which case his family residence may be his tax home. Assuming that such an exception is justified, it must be construed narrowly and strictly.

B

Numerous Tax Court decisions establish that, to prove temporary employment, a taxpayer has the burden of showing, not only that the employment period was actually short, but also that, prior to its commencement, it was anticipated to be short. But analysis of the evidence presented in this case demonstrates that the taxpayers failed to meet that burden. Therefore the Court of Appeals properly rejected, as clearly erroneous, the Tax Court finding that the employments were temporary. At the very least, it is clear that the question is factual in nature and "that the Court of Appeals has made a 'fair assessment' of the record" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401). In these circumstances, we suggest that this Court should not undertake an independent examination of the evidence to determine how this factual issue should be resolved.

ARGUMENT

TAXPAYERS' EXPENDITURES FOR TRAVEL, MEALS, AND LODGING WHILE EMPLOYED AT KINSTON, THEIR POST OF DUTY, WERE NOT INCURRED "WHILE AWAY FROM HOME" WITHIN THE MEANING OF SECTION 23 (a) (1) (A) OF THE INTERNAL REVENUE CODE OF 1939, AND HENCE DO NOT QUALIFY AS DEDUCTIBLE BUSINESS EXPENSES

In *Commissioner* v. *Flowers*, 326 U. S. 465, this Court enumerated three basic requirements which must be satisfied before a traveling expense deduction may be allowed under Section 23 (a) (1) (A) of the

Internal Revenue Code of 1939 (Appendix, *infra*, p. 35).[1] These requirements are (p. 470):

> (1) The expense must be a reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses incurred while traveling.
>
> (2) The expense must be incurred "while away from home."
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade.

The Court stated (p. 469) that it had granted certiorari in that case because of a conflict between the Fifth Circuit decision in *Flowers,* 148 F. 2d 163, and the Fourth Circuit decision in *Barnhill* v. *Commissioner,* 148 F. 2d 913, with respect to the meaning of the word "home" in condition (2) above. Citing *Barnhill,* the Court noted (pp. 471–472) that the Tax Court and the administrative rulings had consistently defined the word "home" as the equivalent of the taxpayer's place of business. On the other hand, said the Court, the Fifth Circuit's *Flowers* decision and *Wallace* v. *Commissioner,* 144 F. 2d 407 (C. A. 9th), had flatly rejected that view and had confined the term to the taxpayer's actual residence. The Court found it

[1] This provision was carried over without substantive change to the 1954 Code, 26 U. S. C. (Supp. V) 162 (a) (2).

unnecessary to enter into or resolve that conflict, deciding rather that the taxpayer in *Flowers* was not entitled to the deduction in any event because the expense was not incurred in pursuit of business.[2]

Now once again the question of he meaning of the word "home" arises in this Court. In this case too, certiorari was sought (Pet. 11), and perhaps granted, on the ground of conflict with *Wallace* v. *Commissioner, supra.* In their extensive brief on the merits, however, the taxpayers apparently do not defend the *Wallace* view, which, as we shall show (*infra*, pp. 17-

[2] The Court of Appeals (R. 38)—correctly, we believe—interpreted this Court's decision in *Flowers* to hold that, in order to qualify for the travel expense deduction under Section 23 (a) (1) (A), the travel of a taxpayer who is an employee must be in pursuance of the employer's business. If so, the travel of the taxpayers in the instant case clearly did not qualify. They were not hired by the employer at Kinston until after they arrived there; and, after they were hired, their employer did not require them to travel. They, like Flowers, were only required by the employer to be at the job site as the exigencies of business demanded. That taxpayers chose to maintain abodes also at Raleigh (78 miles away) and Wilmington (122 miles away), respectively, was of no benefit to their employer. And the cost of their transportation from Raleigh and Wilmington, respectively, to Kinston and return, represented only the cost of moving from one location to find or take employment in a new location. Such transportation costs have never been deductible under Section 23 (a) (1) (A). *United States* v. *Woodall* (C. A. 10th), decided May 6, 1958 (1958 C. C. H., par. 9547); *Tyler* v. *Commissioner*, 13 T. C. 186; *Bixler* v. *Commissioner*, 5 B. T. A. 1181; *McClain* v. *Commissioner*, 2 B. T. A. 726.

The deductions claimed in the case at bar were denied by the Commissioner solely on the theory that taxpayers were not away from home, and appeal was taken to the Court of Appeals only on the ground that the Tax Court erred in finding that taxpayers' post of duty at Kinston was "temporary." The Court of Appeals reversed that finding, and thus had no occasion to

19), has atrophied from lack of acceptance and disuse. Indeed, taxpayers do not even cite *Wallace*, except incidentally in the course of a quotation from the *Flowers* opinion (Br. 38).[3]

The *Wallace* case apart, there is no disagreement as to the controlling legal criteria. Accordingly, as we see the case, the central issue here is purely one of fact—*i. e.*, whether the taxpayers met their burden of proving that their employment at Kinston was "temporary." The Court of Appeals held that the taxpayers had failed to meet this burden, that the Tax Court's finding to the contrary was clearly erroneous (Rule 52 (a), F. R. Civ. P.), and that therefore the taxpayers did not qualify for the exception to the generally accepted definition of "home" as the principal place of employment.[4] On this question of the

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consider whether allowance of the travel and living expenses here could be reconciled with the *Flowers* requirement that the travel must be in pursuance of the employer's business. In view of the course of the particular proceeding below, the Government makes no argument here that the deductions should be denied for failure to meet that requirement. However, as appears *infra*, pp. 29–30, the rationale of *Flowers* is relevant in construing the so-called "temporary employment" exception.

[3] Nor do taxpayers include *Wallace* in their lengthy table of cases (Br. iii–vi).

Wallace stands for the legal rule that "home" for the purpose of Section 23 (a) (1) (A) means, presumably in all cases, the family residence of the taxpayer. In the instant case, however, the taxpayers argue that the issue is really a "matter of evidence" (Br. 43) to be resolved by "a determination of fact" (Br. 50), and they urge that the decision below erroneously erects this "matter of evidence into a rule of law" (Br. 43).

[4] See *Commissioner* v. *Flowers*, *supra*, at 470:

"Whether particular expenditures fulfill these three conditions so as to entitle a taxpayer to a deduction is purely a

substantiality of the evidence, it is abundantly clear, as we shall also show (*infra*, pp. 27–32), "that the Court of Appeals has made a 'fair assessment' of the record" (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401), which, we submit, should not be independently reexamined by this Court.

A. A TAXPAYER'S "HOME" UNDER SECTION 23 (a) (1) (A) IS THE PLACE AT WHICH HE IS INDEFINITELY EMPLOYED

1. *The general rule: "home" is the post of duty*

As the Court noted in *Flowers*, the administrative rulings, dating from 1921, have treated the statutory home as the abode at the taxpayer's post of duty.[5] The same has been true since *Flowers*.[6] Likewise, the Tax Court, both before and after *Flowers*, has consistently followed the administrative interpretation in

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question of fact in most instances."

It should be noted that the rule of *Dobson* v. *Commissioner*, 320 U. S. 489, was rejected by Congress, subsequent to *Flowers*, in 26 U. S. C. 1141 (a), providing for review of Tax Court decisions "in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury * * *." This provision was carried forward in the 1954 Code, 26 U. S. C. (Supp. V) 7482 (a). Rule 52 (a), F. R. Civ. P., provides that "Findings of fact shall not be set aside unless clearly erroneous * * *." See, *e. g.*, *United States* v. *Oregon Medical Society*, 343 U. S. 326, 339; *United States* v. *United States Gypsum Co.*, 333 U. S. 364, 395.

[5] See, *e. g.*, O. D. 905, 4 Cum Bull. 212 (1921); O. D. 1021, 5 Cum. Bull. 174 (1921); Mim. 2688, 4 Cum. Bull. 209 (1921); I. T. 1264, I–1 Cum. Bull. 122 (1922); I. T. 1355, I–1 Cum. Bull. 194 (1922); I. T. 1380, I–2 Cum. Bull. 88 (1922); I. T. 1404, I–2 Cum. Bull. 145 (1922); G. C. M. 4956, VII–2 Cum. Bull. 128 (1928); I. T. 3314, 1939–2 Cum. Bull. 152; G. C. M. 23672, 1943 Cum. Bull. 66.

[6] I. T. 3842, 1947–1 Cum. Bull. 11; Rev. Rul. 54–147, 1954–1 Cum. Bull. 51; Rev. Rul. 54–497, 1954–2 Cum. Bull. 75; Rev. Rul. 55–235, 1955–1 Cum. Bull. 274; Rev. Rul. 55–236, 1955–1

a wide variety of factual situations.[7] Under the circumstances, and in view of the repeated reenactment of the business traveling expense provision in successive revenue acts, the Treasury's interpretation must be deemed to have received implied legislative approval.[8] *Commissioner* v. *Flowers, supra,* at 469; *Helvering* v. *Winmill,* 305 U. S. 79; *Taft* v. *Commissioner,* 304 U. S. 351; *Brewster* v. *Gage,* 280 U. S. 327.

Since *Flowers,* the Court of Appeals for the Eighth Circuit has also adopted the Treasury's interpretation, saying that "Being away from home within the meaning of the tax statute does not necessarily mean being away from the place of abode without reference to the principal place of duty * * *." *Ney* v. *United States,* 171 F. 2d 449, 453, certiorari denied, 336 U. S.

Cum. Bull. 274; Rev. Rul. 55–571, 1955–2 Cum. Bull. 44; Rev. Rul. 55–604, 1955–2 Cum. Bull. 49; Rev. Rul. 56–49, 1956–1 Cum. Bull. 152.

[7] See, *e. g., Birler* v. *Commissioner,* 5 B. T. A. 1181; *Duncan* v. *Commissioner,* 17 B. T. A. 1088, affirmed *per curiam,* 47 F. 2d 1082 (C. A. 2d); *Schmidt* v. *Commissioner,* 11 B. T. A. 1199; *Priddy* v. *Commissioner,* 43 B. T. A. 18, petition for review dismissed July 23, 1941 (C. A. 5th); *Tracy* v. *Commissioner,* 39 B. T. A. 578; *Lindsay* v. *Commissioner,* 34 B. T. A. 840; *Peters* v. *Commissioner,* 19 B. T. A. 901; *Griesemer* v. *Commissioner,* 10 B. T. A. 386; *Brown* v. *Commissioner,* 13 B. T. A. 832; *Powell* v. *Commissioner,* 34 B. T. A. 655; *Schurer* v. *Commissioner,* 3 T. C. 544; *Gustafson* v. *Commissioner,* 3 T. C. 998; *Tyler* v. *Commissioner,* 13 T. C. 186; *Carroll* v. *Commissioner,* 20 T. C. 382.

[8] Section 214 (a) (1) of the Revenue Acts of 1924 (c. 234, 43 Stat. 253) and 1926 (c. 27, 44 Stat. 9); Section 23 (a) of the Revenue Acts of 1928 (c. 852, 45 Stat. 791), 1932 (c. 209, 47 Stat. 169), 1934 (c. 277, 48 Stat. 680), 1936 (c. 690, 49 Stat. 1648), and 1938 (c. 289, 52 Stat. 447). And see note 1, *supra.*

967. The Court of Appeals for the Fourth Circuit, citing *Flowers,* has held even more directly than it did in *Barnhill* that taxpayer's place of duty is his "home" within the meaning of Section 23 (a) (1) (A). *Bercaw* v. *Commissioner,* 165 F. 2d 521. And the Court of Appeals for the Second Circuit, also citing *Flowers,*[9] and in effect overruling its suggestion to the contrary in *Coburn* v. *Commissioner,* 138 F. 2d 763,[10] has stated flatly that "'Home' as used in the statute means the taxpayer's principal place of business or employment." *O'Toole* v. *Commissioner,* 243 F. 2d 302, 303.[11]

Indeed, since this Court's reversal of the Fifth Circuit *Flowers* decision, not a single decision by the Tax Court or the Courts of Appeals has held that "home" as used in the statute may mean an abode at some

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[9] The citation of *Flowers* in these opinions demonstrates that, although the decision in *Flowers* was actually placed on the ground that the travel of taxpayer there was not in pursuit of the business, it has also come to stand for the proposition that a taxpayer, in order to qualify for the travel expense deduction, must be away from his regular post of duty—*i. e.*, his "home." See also *Carragan* v. *Commissioner,* 197 F. 2d 246, 249 (C. A. 2d); *York* v. *Commissioner,* 160 F. 2d 385 (C. A. D. C.).

[10] Even in *Coburn,* the Second Circuit had said that, if the word "home" in Section 23 (a) (1) (A) were used in a special tax sense, it should be limited to the place where he is regularly employed or customarily carries on business during the taxable year (138 F. 2d at 764).

[11] Taxpayers are of course in error in asserting (Br. 37-38) that a holding that the post of duty is the tax "home" disqualifies every taxpayer for a deduction for travel expenses. In making the assertion, taxpayers are simply ignoring the difference between being and not being away from the post of duty—*i. e.*, the place where the taxpayer is regularly employed

place other than the taxpayer's post of duty. Apart from the rejected Fifth Circuit *Flowers* decision, the only appellate authority for that view is the pre-*Flowers* decision of the Ninth Circuit in *Wallace* v. *Commissioner, supra,* 144 F. 2d 407.[12] The fact is that the Wallace view has atrophied from lack of acceptance and disuse. As already noted (*supra,* pp. 14–15), apparently not even the taxpayers defend it. For this Court now to approve the *Wallace* view would be tantamount to an overruling of most of the decisions which passed on the issue prior to *Flowers,* and all the appellate decisions since.

Logic as well as authority requires the definition of "home" which the Commissioner and the lower courts generally have adopted. Despite taxpayers' effort (Br. 17–32) to separate consideration of Section 23 (a) (1) (A) of the 1939 Code from the omnibus disallowance of deductions for personal and living expenses in Section 24 (a) (1) (Appendix, *infra,* p. 36), this Court has said specifically that the former section "is to be contrasted with" the latter (*Commissioner* v. *Flowers, supra, at* 469). Viewed in this statutory set-

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by his employer. That difference is reflected, for example, by *Amoroso* v. *Commissioner,* 193 F. 2d 583 (C. A. 1st), certiorari denied, 343 U. S. 926, where the taxpayer was a manufacturer's representative with an office and residence in the Greater Boston area. While traveling on business a few days each week within the area, he was not away from "home"; but, while traveling in other parts of New England, he was away from "home" and qualified for the deduction.

[12] One district court decision stated its approval of the *Wallace* decision, but the taxpayer there failed to prove the amount of the deductions to which he was entitled and hence none was allowed. *Summerour* v. *Allen,* 99 F. Supp. 318 (M. D. Ga.).

ting, the allowance in Section 23 for business traveling expenses while away from home, inclusive of "meals and lodging," has a patent objective. It is designed to extend relief to a taxpayer who in pursuit of his trade or business must travel temporarily or intermittently away from the locality which is his regular post of duty. Were a taxpayer's expenses for meals and lodging at the locality of his post of duty and in commuting to and from it held deductible, the legislative mandate in Section 24 would be frustrated; for obviously all taxpayers engaged in trade or business must incur such living and personal expenses, wherever they may keep their living headquarters. Cf. *Commissioner* v. *Moran*, 236 F. 2d 595, 597 (C. A. 8th).

Such a view, moreover, would produce the incongruous result that subsistence and commuting expenses would remain nondeductible living and personal expenses under Section 24 if the taxpayer had his living headquarters in the locality of his post of duty, but would presumably be transformed into deductible business traveling expenses under Section 23 if he chose to maintain, in addition to living quarters in the neighborhood of his business (*e. g.*, New York), separate living quarters elsewhere which he regarded as his home (*e. g.*, Florida). It would impute to Congress an intention to discriminate against those taxpayers who have a single dwelling place in the vicinity of their working headquarters, and in favor of those who own or rent several dwelling places simultaneously, one in proximity to the place where they work and one or more elsewhere. See *Ney* v.

United States, 171 F. 2d 449 (C. A. 8th), certiorari denied, 336 U. S. 967; *York* v. *Commissioner*, 160 F. 2d 385 (C. A. D. C.).

There is no warrant in the language or legislative history of the statute for such a view. Even if the legislative purpose in this respect were not as plain as it is, "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." *Colgate Co.* v. *United States*, 320 U. S. 422, 425. When the traveling expense provision is examined in conjunction with Section 24, it follows, we believe, that "while away from home" as used in Section 23 has reference to a temporary business trip away from an abode at the locality where the taxpayer is earning his livelihood, not to absence from an abode elsewhere.

If this general rule is applied in the instant case, it follows that the taxpayers were not "away from home" while employed at Kinston, the site of the construction job involved here; for Kinston was taxpayers' post of duty, and they had no other during the time they were there.[13]

2. The exception as to a temporary post of duty

Upon the general rule, however, the Tax Court has engrafted an exception—apparently of primary benefit to construction workers—which has been accepted by the Commissioner and which was applied in the instant case. Relying on its decisions in *Schurer* v. *Commissioner*, 3 T. C. 544, and *Leach* v. *Commissioner*,

[13] Certainly the cities of Wilmington and Raleigh, at or near which they maintained residences for their respective families, could not qualify as such, for in those places taxpayers had no employer or employment.

12 T. C. 20, the Tax Court held that taxpayers' post of duty at Kinston was temporary, as contrasted with indefinite or indeterminate, and that they therefore were entitled to the travel expense deduction since their family residences were located elsewhere.[14]

As demonstrated above, if the location of a taxpayer's family residence were generally determinative, every commuter would be entitled to the deduction, whereas commuters are the clearest category of taxpayers who are not entitled to the deduction.[15] *O'Toole* v. *Commissioner, supra*; *Amoroso* v. *Commissioner*, 193 F. 2d 583 (C. A. 1st), certiorari denied, 343 U. S. 926; Treasury Regulations 118, Section 39.23 (a)-2 (Appendix, *infra*, p. 37). Therefore, in holding that these taxpayers were entitled to the travel expense deduction even while working at their only post of duty, merely because their family residences were located somewhere else, the Tax Court, in effect, held that a taxpayer's principal post of duty is his tax "home" *except* when that post of duty is temporary.

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[14] Compare *Bark* v. *Commissioner*, 6 T. C. 851; *Johnson* v. *Commissioner*, 8 T. C. 303; *Albert* v. *Commissioner*, 13 T. C. 129; *Warren* v. *Commissioner*, 13 T. C. 205; *Jones* v. *Commissioner*, 13 T. C. 880; *Carroll* v. *Commissioner*, 20 T. C. 382; *Hammond* v. *Commissioner*, 20 T. C. 285, affirmed, 213 F. 2d 43 (C. A. 5th); *Claunch* v. *Commissioner*, 29 T. C. No. 109, appeal pending (C. A. 5th); *Milne* v. *Commissioner*, decided September 29, 1949 (1949 P-H T. C. Memorandum Decisions, par. 49,231), affirmed *per curiam*, 181 F. 2d 503 (C. A. 3d). See also note 17, *infra*.

[15] Taxpayers' suggestion (Br. 29) that commuting expenses are not "personal" expenses within the meaning of Section 24 (a) (1) is clearly refuted by *Commissioner* v. *Flowers*, *supra*, p. 473: "Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal ex-

in which case his family residence may be his tax "home." [16]

Under this exception, a taxpayer who is employed temporarily at a particular place may be regarded as being "away from home" even though he has no other post of duty, whereas one whose employment is indefinite or indeterminate is not "away from home" and therefore not entitled to the deduction. The exception is ameliorative in nature, and is apparently based on the theory that it is inequitable to call the post of duty the tax "home" if the taxpayer, being there only temporarily, is forced by economic circum-

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penses lacking the necessary direct relation to the prosecution of the business."

And in *Commissioner* v. *Moran*, 236 F. 2d 595, 597 (C. A. 8), the court said:

"Everyone must have food and shelter. They are personal things essential to all of us alike, regardless of occupation. They do not lose their personal characteristics because they may contribute indirectly to a taxpayer's business activities. If that were not so, a taxpayer's lunch necessarily purchased away from home, his cost of going to the office or factory and returning, and innumerable other items would become business expenses of the individual taxpayer. It is true that certain expenses normally personal may become deductible by reason of intimate relation to an occupation carried on away from home or partially away from the principal place of doing business, but this is so because of the predominant business characteristics of the expense."

[16] Taxpayers are not completely accurate in stating (Br. 21) that a taxpayer "may have a business headquarters with his union local which is recognized as a 'tax home' under rulings issued by the Commissioner," citing a Special Ruling of May 4, 1956 (1956 P-H, par. 76, 519), and that the Commissioner has conceded that the headquarters of the respective union locals were taxpayers' "tax homes." In the Special Ruling, which relates only to nonitinerant construction workers, the Commis

stances to maintain a residence elsewhere.[17] On the other hand, it can not be said that a taxpayer is engaged in "traveling" if he is employed at a particular post of duty for an indefinite or indeterminate period. Assuming that such an exception is justified, the exception must be construed narrowly and strictly.[17a] Cf. *Corn Products Co.* v. *Commissioner*, 350 U. S. 46, 52.

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sioner recognized an exception to the general rule that the post of duty is the tax home, but that ruling is circumscribed by a number of important limitations. For example, the ruling, while stating that the business headquarters may be considered the tax home if the employment elsewhere is temporary and widely scattered, states that, in determining whether a taxpayer has such a business headquarters, such factors as the location of the taxpayer's residence, the place where he makes his employment contracts, and the locality to which he returns on the termination of temporary employment must be taken into consideration. In brief, as the Tax Court assumed in its opinion in the present case (R. 26–27), there must be no substantial difference between residence and union headquarters. Moreover, the Special Ruling is expressly inapplicable to taxpayers who are employed at any particular location for more than a year.

[17] It should be noted that, under the exception to the general rule, allowance of the deduction is not based solely on the fact of temporary employment. Thus, itinerant workers (*e. g.*, musicians) do not qualify for the deduction, on the theory that their home is synonymous with the place where they happen to be working at any given time. *Fisher* v. *Commissioner*, 23 T. C. 218, affirmed, 230 F. 2d 79 (C. A. 7th); *Mitnick* v. *Commissioner*, 13 T. C. 1.

Since the exception, as noted, generally inures to the benefit of taxpayers in petitioners' circumstances, it is difficult to understand their attack (*e. g.*, Br. 43–50) on the validity of this exception. Apart from this exception, it is clear that the Tax Court would have denied the claimed deductions.

[17a] Particularly is this so if taxpayers are also to be relieved of the *Flowers* requirement that the travel be in pursuit of the employer's business. See note 2, *supra*.

To bring himself within the exception and prove that his employment is temporary, a taxpayer, according to the criteria applied by the Tax Court in numerous cases, must show not only that the employment period is actually short,[18] but also that, prior to its commencement, it was anticipated to be short.[19]

[18] For example, in *Warren* v. *Commissioner*, 13 T. C. 205, the taxpayer left his wife and two children at the family residence in Cornelia, Georgia, and went to work at the Navy Yard in Charleston, South Carolina, for the duration of the war. The Tax Court said (p. 208):

"In the case at bar petitioner was continuously employed at one post of duty, the Navy Yard in Charleston, South Carolina, for more than two years. His employment there was not temporary, but indefinite. There is a well recognized difference between 'indefinite' employment and 'temporary' employment."

This language was subsequently quoted with approval in *Milne* v. *Commissioner*, decided September 29, 1949 (1949 P–H T. C. Memorandum Decisions, par. 49,231), affirmed *per curiam*, 181 F. 2d 503 (C. A. 3d).

In *Bark* v. *Commissioner*, 6 T. C. 851, the taxpayer accepted employment out of town for three months, but before that was completed, he agreed to stay on for another period, and then another. Altogether he remained about three years. The Tax Court denied the deduction, saying (p. 855):

"Although the petitioner well understood when he accepted his first employment with the Midvale Co. that it was to be for a period of only three or four months, the situation was vastly different so far as it relates to the year 1941. What was originally temporary employment had by 1941 become an employment of indeterminate duration."

[19] The requirement that shortness of duration be anticipated is demonstrated by cases in which the Tax Court found that the respective taxpayers were not away from home because their employment was indefinite. In *Ford* v. *Commissioner*, decided November 30, 1954 (1954 P–H T. C. Memorandum Decisions, par. 54,314), affirmed *per curiam*, 227 F. 2d 297 (C. A. 4th), the Tax Court said:

"Petitioner's employment at Front Royal was expected to continue for from 12 to 14 months. Actually, it extended over

With respect to the latter requirement, if the employment is not foreseen to be for a short (as distinguished from indeterminate) period, the taxpayer's assignment at the new post of duty cannot be properly characterized as "traveling" under the statute; and such a taxpayer, if he continues to maintain his residence at a distance from the job, is no more entitled to preferential tax treatment than other taxpayers who live at or near the site of their employment.

Accepting these legal criteria as controlling, the only question that remains is their application to particular facts. In the cases at bar, that factual issue was resolved in taxpayers' favor by the Tax Court, but

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a period of more than 24 months. Petitioner did not anticipated that his assignment to the project in Front Royal would be of short or 'temporary' duration. The fact of the matter is that the employment in Front Royal was to be for at least a year. While the assignment to Front Royal was not to be a permanent one, it clearly was not merely temporary. That its duration was indefinite does not bring it within the class of temporary employment, the termination of which within a short period could be foreseen."

Similarly, in *Albert* v. *Commissioner*, 13 T. C. 129, the Tax Court said, comparing the case to *Bixler* v. *Commissioner*, 5 B. T. A. 1181 (p. 131):

"The employment in each case lacked permanence, but, on the other hand, was indefinite in duration rather than obviously temporary, in that it was not the sort of employment in which termination within a short period could be foreseen, as was the situation in *Harry F. Schurer*, 3 T. C. 544, and *E. G. Leach*, 12 T. C. 20. The suggestion or warning that there might be a change of station upon short notice does not justify extensive discussion, since the evidence fails to show how probable this possibility was, except for the fact that the petitioner actually remained on duty in Lowell from 1943 until the end of 1945."

See also *Claunch* v. *Commissioner*, *supra;* Rev. Rul. 54-497, 1954-2 Cum. Bull. 75, 79.

the Court of Appeals reversed. We suggest that this is the kind of factual issue that this Court should not independently reexamine, and that the holding of the Court of Appeals should not be disturbed.

B. TAXPAYERS FAILED TO MEET THEIR BURDEN OF PROVING THAT THEIR POST OF DUTY AT KINSTON WAS TEMPORARY

In the present case, the Court of Appeals reversed, as clearly erroneous, the Tax Court's finding that the taxpayers' post of duty at Kinston was temporary. Since the decision turns upon a question of fact, this Court, under principles recently reaffirmed, need go no further than determine that the Court of Appeals has made a "fair assessment" of the record. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401, 404. In the latter case, in circumstances similar to those here, an order of the Federal Trade Commission had been set aside by the Court of Appeals. On certiorari, this Court concluded that the decision of the Court of Appeals turned on a question of fact, and accordingly declined to reweigh the evidence. The Court stated (p. 401) that it would "intervene only in what ought to be the rare instance when the standard [of substantiality of the evidence] appears to have been misapprehended or grossly misapplied" (quoting *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474, 491) and that it would "do no more on the issue of insubstantiality than decide that the Court of Appeals has made a 'fair assessment' of the record." See also *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

That the Court of Appeals has made such a "fair assessment" here seems clear. Indeed, even were this

Court inclined to reweigh the record *de novo,* it would find no basis upon which the Tax Court, applying its own previously established criteria, could properly have determined that taxpayers' jobs at Kinston were temporary.

1. *Taxpayers did not show that the actual duration of the jobs was short*

Taxpayers presented no evidence as to when the construction project at Kinston was actually concluded. Taxpayer Peurifoy worked there from March 10, 1952, until November 20, 1953, about 20½ months, by no means a short time; there was no showing that he could not have continued there longer if he had wished to do so. (Peurifoy Stip. par. 7 (b), R. 9.) Taxpayer Stines worked at the project from March 26, 1952, until April 10, 1953, about 12½ months, not a short time; he left for "personal reasons" (Stines Stip. par. 8 (a), R. 12), and might otherwise have continued to work there for an unknown additional length of time. Taxpayer Hall worked at the Kinston project from October 21, 1952, through July 10, 1953, about 8½ months; he also resigned for "personal reasons" (Hall Stip. par. 8 (b), R. 16), and he too might otherwise have continued to work there for an unknown additional length of time.

The record thus plainly fails to support the Tax Court's finding that taxpayers' post of duty at Kinston was temporary. It even fails to establish, at least with respect to Peurifoy and Stines,[20] that the actual

[20] If the 8½ months actually spent by Hall on the job may be considered short, the cases show that shortness alone is not cause for labeling employment temporary rather than indefi-

period of time spent at Kinston was short. And, with respect to all three taxpayers, the record fails to establish that their employment could not have been actually longer than it was. The latter criterion—the duration of the jobs for which the taxpayers were hired, rather than the time the taxpayers spent on those jobs—is necessarily the prime consideration. For example, two of the taxpayers—Hall and Stines—resigned for "personal reasons." It can hardly be contended that a taxpayer hired for an indefinite or indeterminate period can make his post of duty "temporary"—and his living expenses deductible—simply by taking another job elsewhere "for personal reasons."

As this Court said in *Flowers*: "Business trips are to be identified in relation to business demands and the

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nite. *Whitaker* v. *Commissioner*, 24 T. C. 750 (222 days); *Carroll* v. *Commissioner*, 20 T. C. 382 (308 days); *McGinley* v. *Commissioner*, decided May 22, 1956 (1956 P-H T. C. Memorandum Decisions, par 56,124) (6 months); *Pauley* v. *Commissioner*, decided November 16, 1954 (1954 P-H T. C. Memorandum Decisions, par. 54,298) (one year, 3 months, and 18 months); *Harrington* v. *Commissioner*, decided April 22, 1953 (1953 P-H T. C. Memorandum Decisions, par. 53,139) (9 months, 15 months and 11 months); *Bryson* v. *Commissioner*, decided January 13, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,016) (separate employments of about 9 months and 50 weeks); *Pennington* v. *Commissioner*, decided October 31, 1950 (1950 P-H T. C. Memorandum Decisions, par. 50,257) (6 months); *Taylor* v. *Commissioner*, decided March 17, 1948 (1948 P-H T. C. Memorandum Decisions, par. 48,034) (8 months and 11 months); Rev. Rul. 54-497, 1954-2 Cum. Bull, 75, 80 (3 or 4 months). Moreover, Hall resigned for "personal reasons" and, as pointed out in the text, can hardly be allowed to claim that the time he chose to spend at Kinston is the equivalent of the duration of the job for which he was hired.

traveler's business headquarters. The exigencies of business rather than the personal conveniences and necessities of the traveler must be the motivating factors. Such was not the case here." 326 U. S. at 474. See footnote 2, p. 14, *supra*.

2. *Taxpayers did not show that the jobs were anticipated to be of short duration*

Not only did the taxpayers fail to prove that the duration of their jobs at Kinston was short in fact, but they also failed to meet the second requirement of a "temporary" post of duty—*i. e.*, that the jobs were foreseeably short (*supra*, pp. 25–26). The only testimony in this regard was that of taxpayer Hall, of which the Tax Court said (R. 28):

> The petitioner Hall testified that when they entered upon a job at a particular site, including the Kinston job, they were not guaranteed the job for any specified time and did not know how long they would be employed there, although there was usually some hearsay information as to the duration of the work.

Certainly nothing in this statement indicates that the duration of taxpayers' employment was foreseen to be short or definite; on the contrary, it indicates indeterminateness and indefiniteness.

In this state of the record, the Tax Court, in effect, indulged in little more than a presumption that the foreseeable duration of the employments at Kinston was short and fairly definite; for there was no evidence of this. On the contrary, the evidence is equally consistent with the hypothesis (for example) that the Kinston project would last four or five or

more years. The Tax Court stated that there was no reason for taxpayers to believe that the nature of the employment at Kinston would be any different from that of other jobs which formed the general pattern of their employment. That, however, did not support the finding of the court that the employment at Kinston was temporary; for the evidence as to the general pattern of taxpayers' employment experience *prior* to the employment at Kinston is sparse and inconclusive, and such experience as was indicated could not have been very helpful to taxpayers in determining whether their employment at Kinston was going to be temporary or indefinite.[21]

The determination of the Commissioner is presumed to be correct and the burden lies upon taxpayers to prove his determination erroneous. *Welch* v. *Helvering,* 290 U. S. 111, 115. In order to carry that burden, taxpayers had to demonstrate *inter alia* that they were "away from home" while employed at

[21] All that the record shows about this period is that Peurifoy worked on a paper mill project at Acme, North Carolina, for 7 months (Peurifoy Stip. par. 7 (a), R. 9); that since becoming a member of the union in 1947, Stines "has worked on different projects in the States of Virginia, North Carolina, South Carolina, Georgia and Florida" (Stines Stip. par. 7, R. 12); and that after he joined the union, Hall's only job prior to the one in issue was for approximately one year at Neuse, North Carolina (Hall Stip. p. 8 (a), R. 16).

The Commissioner conceded—rightly or wrongly—that the employments of Stines at Charleston, South Carolina, for about three weeks, and at Fort Bragg, North Carolina, for about 7½ weeks, were temporary, but these employments *followed* the employment at Kinston. (R. 13-14.) All the other employments of taxpayers may or may not have been temporary.

Kinston. To do so, it was necessary to establish that the employment at Kinston was temporary; and that in turn, by the Tax Court's own criteria, required a showing that the employment was foreseen to be short and actually was short.[22] Taxpayers failed to prove either; and the Tax Court's finding to the contrary, therefore, was clearly erroneous, as the Court of Appeals held. At all events, we submit, on this record there is no basis for this Court to disturb the determination made by the Court of Appeals on this factual issue.

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[22] The taxpayers (*e. g.*, Br. 23, 25, 53) emphasize that the Commissioner's statutory 90-day letters denied the claimed deductions on the ground that the expenses were "personal and living" expenses. From this premise, taxpayers apparently argue (Br. 53) that they had no burden to show that their employment at Kinston was temporary. But the Commissioner's determination that the expenses were "personal and living" expenses obviously negatived the taxpayers' claimed eligibility for the travel expense deduction under Section 23 (a) (1) (A). See p. 19, *supra*. That being so, to overcome the Commissioner's determination, and to obtain the deduction, it was incumbent on the taxpayers to establish that their expenditures were incurred "away from home" within the meaning of Section 23 (a) (1) (A), either under the general rule or under the exception. To do the latter, it was, of course, essential to show that their employment at Kinston was temporary.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the Court of Appeals should be affirmed.

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SEPTEMBER 1958.

APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

* * * * *

(n) [As added by Section 8 (a), Individual Income Tax Act of 1944, c. 210, 58 Stat. 231] *Definition of "Adjusted Gross Income".*—As used in this chapter the term "adjusted gross income" means the gross income minus—

* * * * *

(2) *Expenses of travel and lodging in connection with employment.*—The deductions allowed by section 23 which consist of expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee;

* * * * *

(26 U. S. C. 1952 ed., Sec. 22.)

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

(a) [As amended by Section 121 (a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Expenses.*—

(1) *Trade or business expenses.*—

(A) *In General.*—All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including * * *; traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; * * *.

* * * * *

(26 U. S. C. 1952 ed., Sec. 23.)

SEC. 24. ITEMS NOT DEDUCTIBLE.

(a) *General Rule.*—In computing net income no deduction shall in any case be allowed in respect of—

(1) [As amended by Section 127 (b), Revenue Act of 1942, *supra*] Personal, living, or family expenses, except extraordinary medical expenses deductible under section 23 (x);

* * * * *

(26 U. S. C. 1952 ed., Sec. 24.)

Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939:

Sec. 39.22 (n)–1. *Adjusted gross income.* (a) The term "adjusted gross income" means the gross income computed under section 22 minus such of the deductions allowable under section 23 as are specified in section 22 (n). * * *

(b) Section 22 (n) does not create any new deductions, but merely specifies which of the deductions provided in section 23 shall be allowed in computing adjusted gross income. The circumstance that a particular item is specified in one of the clauses under section 22 (n) and is also embraced within the terms of another of such clauses does not permit the item to be twice deducted in computing adjusted gross income.

(c) The deductions specified in section 22 (n) for the purpose of computing adjusted gross income are: (1) Deductions allowable under section 23, which are attributable to a trade or business carried on by the taxpayer not consisting of services performed as an employee; (2) deductions allowable by section 23 which constitute expenses of travel, meals, and lodging while away from home, paid or incurred by the taxpayer in connection with the performance by him of services as an employee; (3) deductions allowable by section 23 (other than expenses of travel, meals, and lodging while away from home) which consist of expenses

paid or incurred in connection with the performance of services as an employee under a reimbursement or other expense-allowance arrangement with his employer; * * *

(d) For the purpose of the deductions specified in section 22 (n) the performance of personal services as an employee does not constitute the carrying on of a trade or business. * * *

* * * * *

Sec. 39.23 (a)–1. *Business expenses.* Business expenses deductible from gross income include the ordinary and necessary expenditures directly connected with or pertaining to the taxpayer's trade or business, except items which are used as the basis for a deduction or a credit under provisions of law other than subsection (a) of section 23. Double deductions are not permitted. Amounts deducted under one provision of the Internal Revenue Code cannot again be deducted under any other provision thereof. * * * Among the items included in business expenses are * * * traveling expenses while away from home solely in the pursuit of a trade or business * * *.

Sec. 39.23 (a)–2. *Traveling expenses.* (a) Traveling expenses, as ordinarily understood, include railroad fares and meals and lodging. * * *

* * * * *

(f) Only such expenses as are reasonable and necessary in the conduct of the business and directly attributable to it may be deducted.

(g) A taxpayer claiming the benefit of the deductions referred to in this section must attach to his return a statement showing (1) the nature of the business in which engaged; (2) the number of days away from home during the taxable year on account of business; (3) the total amount of expenses incident to meals and lodging while absent from home on business

during the taxable year; and (4) the total amount of other expenses incident to travel and claimed as a deduction.

(h) Claim for the deductions referred to in this section must be substantiated, when required by the Commissioner, by evidence showing in detail the amount and nature of the expenses incurred.

(i) Commuters' fares are not considered as business expenses and are not deductible.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

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Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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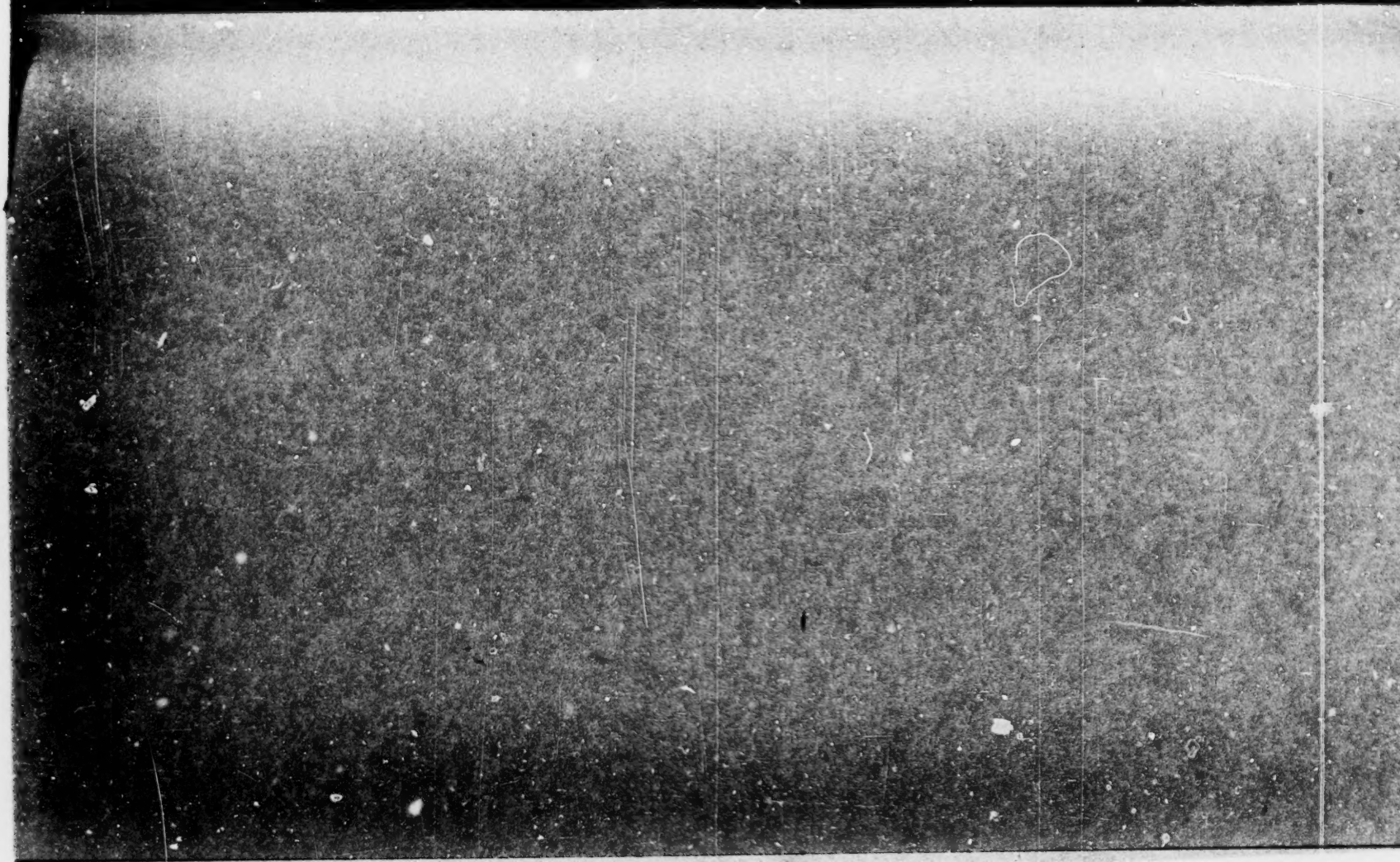

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REPLY BRIEF FOR THE PETITIONERS

ARGUMENT

In Reply to Certain Allegations on Pages 10 and 11 of Respondent's Brief:

On pages 10 and 11 of his brief respondent asserts:

> "... The view that 'home' must be read literally as the place where taxpayer may choose to reside; irrespective of the location of his post of duty, would produce the incongruous result that subsistence and commuting expenses would remain nondeductible under Section 24 if the taxpayer

> had his living quarters in the locality of his post of duty, but would be transformed into deductible business traveling expenses under Section 23 if he chose to maintain, in addition to living quarters in the neighborhood of his business, separate living quarters elsewhere which he regarded as his residence."

This assertion is an entire distortion of petitioner's position. Expenses incurred as a result of the "choice of" a taxpayer in having a home distant from his employment are not deductible under petitioners' theory. In this respect petitioners said (Pet. Brief, p. 32):

> ". . . The legal conclusion that such expense is nondeductible then attaches immediately by force of Section 24(a)(1), *if* the expense be classified as 'personal' in the sense that it is incurred as the result of the 'choice of' or 'personal propensities of' the taxpayer."

Respondent's assertion assumes that the principles controlling the nondeductibility of commuting expenses should be applied to the instant problem. Commuting expenses and traveling expenses are two entirely different things as is evidenced by the fact that commuting expenses are not deductible and traveling expenses (as defined in Section 23) are deductible. Both types of expenses require physical movement away from one's residence. This does not transform traveling expenses into commuting expenses as asserted by respondent. Each class of expenses is controlled by separate principles of law. It is neither necessary nor proper to equate traveling expenses with commuting expenses. It *is* necessary that a particular physical movement from a residence be classified as a commut-

ing expense or a traveling expense. This latter question is not before this Court in this proceeding.

How is one to decide when a taxpayer is maintaining a home distant from his place of employment from "personal choice"? It is submitted that this question must be decided on the basis of all the pertinent facts. To say that *James R. Whitaker* in 24 T.C. 750 maintained a home offshore of Thule, Greenland as a matter of personal choice is a travesty of logic. Yet the same logic implemented in this proceeding was used to deny Whitaker a deduction. The instant petitioners do not maintain homes distant from their employments as a matter of "personal choice".

In Reply to Certain Allegations on Page 11 of Respondent's Brief:

On page 11 of his brief respondent refers to certain "exceptions" to the applicable principles of law, saying:

> ". . . Upon the general rule, however, has been engrafted an exception which the Tax Court applied in the instant case."

The decision of the Court of Appeals below referred to such exception saying (R. 38):

> ". . . If we assume the validity of this exception to the rule of *Commissioner* v. *Flowers* as applied to one not self employed, it is essential that the employment away from the established tax home shall be temporary in contemplation at the time of its acceptance and not indeterminate in fact as it develops."

This Court laid down three requirements for deductibility of travel expenses in *Commissioner* v. *Flowers*, 326 U. S. 465. As a matter of legal jurisprudence, there can be no exceptions to the mandate of this Court if the matter in issue is within the orbit of its decision.

In Reply to Certain Allegations on Pages 14 and 15 of Respondent's Brief:

On page 14 of his brief respondent states:

> "... In their extensive brief on the merits, however, the taxpayers apparently do not defend the *Wallace* view, which, as we shall show (*infra*, pp. 17-19), has atrophied from lack of acceptance and disuse."

This assertion by respondent seems strange indeed when the subject matter of the brief of the petitioners is unquestionably based on the premise that the doctrine that "home is synonymous with post of duty" is erroneous. On page 42 of petitioners' brief the following statement appears:

> "The glaring fallacy in the doctrine that 'home is synonymous with post of duty' is revealed by the manner in which the courts have applied it to the problems raised by Section 23(a)(1)(A) ... The words of the statute when compared with the words in this doctrine are exact opposites. The doctrine that 'home is synonymous with post of duty' reduces the simple phrase 'away from home in pursuit of a trade' found in the statute to senseless jargon."

In the case of *Wallace* v. *Commissioner*, 144 F. 2d 407, 410-411 the court said:

> "Our first inquiry is to ascertain whether there is any indication of an intention by Congress to employ the expression 'away from home in the

pursuit of a trade or business' in the legislation under consideration other than according to the ordinary and usual meaning of the words used. The plain, obvious and rational meaning of a tax statute is always to be preferred to any narrow or hidden sense that nothing but the exigency of a hard case justifies, and while the meaning to be given to terms used will be determined from the character of their use by the legislature in the statute under consideration, words in common use should not be distorted by administrative or judicial interpretation. This is, in effect, what has been done by the Commissioner and sustained by the Tax Court."

* * * * *

". . . On the other hand, to judicially innovate a meaning of 'home' as the taxpayer's 'place of business, employment, or the post or station at which he is employed', as the Tax Court has done, would, we think, operate to thwart the obvious purpose of Congress to tax *net* income and would in many cases tax the gross instead of the net income of individuals."

The above quotations disclose the complete agreement of petitioners with the *Wallace* decision. The propheey therein that the doctrine that "home is synonymous with post of duty" would result in the taxing of gross income instead of net income has been abundantly fulfilled (See numerous cases in Appendices E and F of Brief for Petitioners at pages 8a and 11a).

Admittedly the *Wallace* decision has not been frequently followed. It is to be noted that appeals are expensive and that the class of taxpayers here involved could ill afford to prosecute their claims beyond a Tax Court hearing, or for that matter even in the Tax Court. Many of the cases are pro se cases including

the important decisions of *James R. Whitaker*, 24 T.C. 750 and *Albert P. Tiernan*, P-H T.C. Mem. Dec., Par. 55,059.

Truth and right reason can never atrophy though frequently obscured for an unseemly long time. It is my belief the *Wallace* decision reflects the truth and right reason of this situation.

In Reply to Certain Allegations in Footnote on Pages 14 and 15 of Respondent's Brief:

In the footnote 2 on page 14 of his brief respondent states:

> "The Court of Appeals (R. 38)—correctly, we believe—interpreted this Court's decision in *Flowers* to hold that, in order to qualify for the travel expense deduction under Section 23(a)(1)(A), the travel of a taxpayer who is an employee must be in pursuance of the employer's business."

This position of respondent is clearly rebutted by the language of this Court in the *Flowers* case when it said (326 U. S. at p. 470):

> "(3) The expense must be incurred in pursuit of business. This means there must be a direct connection between the expenditures and the carrying on of the trade or business *of the taxpayer or of his employer.*" (Emphasis added).

This position of the respondent is further rebutted by the fact that respondent concedes that the expenses in question are deductible if the employment is "temporary". The relationship of the taxpayer to his job in these cases is the same, irrespective of the duration

of the employment. In his statement of facts, respondent states (Resp. Brief, p. 2):

> "... They all obtain employment through their local union, which sends them to various work sites where they are then hired by the employer (R. 19)."

This is true in respect to employments categorized as "temporary" as well as those categorized as "indefinite". Yet in respect to temporary employments, respondent admits such hiring procedure does not disqualify petitioner for the deduction.

The allegation in this footnote that the travel "was of no benefit to their employer" is not true. In his statement of facts respondent states (Resp. Brief, p. 3):

> "... Where a job requires more skilled craftsmen than a local union has available in the area, the local union will deal with other local unions in the same state or other states in order to procure the *necessary* workers." (Emphasis added).

The mobility of workers as a necessary and essential characteristic of the construction industry stands admitted. Mobility requires travel with resultant expense and provides an unquestioned benefit to the employers.

In Reply to Certain Allegations on Pages 15 and 16 of Respondent's Brief:

On pages 15 and 16 of his brief respondent states:

> "... On this question of the substantiality of the evidence, it is abundantly clear, as we shall also show (*infra*, pp. 27-32), 'that the Court of Appeals has made a "fair assessment" of the record'

> (*Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 401), which, we submit, should not be independently reexamined by this Court."

Petitioners submit that the Court of Appeals below gave *no* consideration to the substantiality of the evidence. The conclusion of the Court of Appeals below was based entirely on the proposition that a "place of temporary employment is not a tax home but that a place of indefinite employment is a tax home".

The expenses in question were originally disallowed by the Commissioner because the expenses in question were personal. The issue thus raised falls exclusively under the provisions of Section 24(a)(1). The Commissioner did not maintain in his statutory notice that any of the three requirements of the *Flowers* case had not been met. Thus, it is apparent that in a strict technical sense, the issues raised by Section 23(a)(1)(A) *ought not be before this Court.* The expenses were disallowed under Section 24(a)(1) only. There was no allegation in his 90-day notice of disallowance for failure to meet any of the three requirements of *Flowers.*

Respondent in his brief states (Resp. Brief, p. 10):

> "... In the Commissioner's view, the taxpayers here are not entitled to the deductions claimed as travel expenses because they were not incurred 'away from home'."

Since the original grounds for disallowance are based exclusively on the Commissioner's position that the expenses were personal—a problem created by Section 24(a)(1) —it requires a considerable effort to understand how the expenses were disallowed because of the above allegation by the Commissioner that the ex-

penses were not incurred "away from home"—a problem raised by Section 23(a)(1)(A).

Two fundamental errors of logic produce this result. The first error is in assuming that an expense is "personal", as the word is used in Section 24(a)(1), because such expense is nondeductible under 23(a)(1)(A). This problem logically requires an independent factual determination as shown in petitioners' brief. (Pet. Brief, p. 25).

The second error arises by applying the doctrine that "home is synonymous with a post of duty or an indefinite post of duty". The application of this doctrine is applied as a matter of substantive law by the Court of Appeals below thereby producing automatic disallowance of the expenses under Section 23(a)(1)(A). Once the employment is classified as "indefinite" (for any one of the numerous reasons advanced by respondent) consideration of the facts in respect to the three requirements of the *Flowers* case is made impossible.

It is submitted that the decision of the Court of Appeals below is not based on an evaluation of the evidence but on the application of the erroneous principles of law as above described.

In Reply to Certain Allegations on Pages 16 and 17 of Respondent's Brief:

On pages 16 and 17 of his brief respondent states:

> "As the Court noted in *Flowers*, the administrative rulings, dating from 1921, have treated the statutory home as the abode at the taxpayer's post of duty. The same has been true since *Flowers*. Likewise the Tax Court, both before and after *Flowers*, has consistently followed the administrative interpretation in a wide variety of factual

> situations. Under the circumstances, and in view of the repeated reenactment of the business traveling expense provision in successive revenue acts, the Treasury's interpretation must be deemed to have received implied legislative approval. *Commissioner* v. *Flowers, supra* at 469; . . ."

This Court did not see fit to use this argument to sanction the doctrine that "home is synonymous with post of duty" in the *Flowers* case. Rather, it carefully and specifically refrained from sanctioning the doctrine.

The doctrine that reenactment of a statute which has received administrative interpretation is considered to be given implied legislative approval of such interpretation is subject to well known exceptions. No amount of legislative re-enactment of a statute will validate an unreasonable practice in interpreting it. *Titsworth* v. *Commissioner,* 73 F. 2d 385, (3rd Cir. 1934). Nor will the doctrine of legislative reenactment validate an administrative interpretation which is contrary to the terms of the statute. *F.H.E. Oil Co.* v. *Commissioner,* 147 F. 2d 1002 (5th Cir. 1945). The Secretary of the Treasury cannot by his regulations alter or amend a revenue law. All he can do is regulate the mode of proceeding to carry into effect what Congress has enacted. *Morrill* v. *Jones,* 106 U.S. 466 (1883); *Allis* v. *LaBudde,* 128 F. 2d 838 (7th Cir., 1942). A subsequent reenactment of a provision which is not ambiguous will not make a regulation controlling which makes a strained construction of the provision. *Busey* v. *The Deshler Hotel Company,* 130 F. 2d 187 (6th Cir. 1942).

In the instant case the doctrine that "home is synonymous with post of duty or indefinite post of

duty" goes far beyond "interpretation" of an act of Congress but seeks to erect a rule of law independent of and in conflict with the statutory enactment.

In Reply to Certain Allegations in Footnote on Page 18 of Respondent's Brief:

In footnote 9 on page 18 of his brief respondent states:

> "The citation of *Flowers* in these opinions demonstrates that, although the decision in *Flowers* was actually placed on the ground that the travel of taxpayer there was not in pursuit of the business, it has also come to stand for the proposition that a taxpayer, in order to qualify for the travel expense deduction, must be away from his regular post of duty—*i. e.*, his 'home'."

This Court specifically refused to rule on this point in the *Flowers* case saying (326 U. S. at p. 471):

> "We deem it unnecessary here to enter into or decide the conflict."

How then, could the *Flowers* case "come to stand for" something it specifically refused to rule upon? The answer, of course, is that such result could only come about by misinterpretation and misapplication of the *Flowers* decision. This was dramatically indicated in this proceeding when respondent characterized certain grounds in the taxpayers' petition for a writ of certiorari as being "patently without merit" saying (Brief For Resp. In Opposition, p. 8):

> ". . . In *Flowers* this Court (p. 472) expressly refrained from deciding the meaning of 'home' in Section 23(a)(1)(A)."

It was the Court of Appeals below which improperly cited the *Flowers* case in support of its position, not the petitioners herein as was assumed by the respondent when he classified the grounds for the petition as "patently without merit".

In footnote 11 on page 18 of his brief, respondent states:

> "Taxpayers are of course in error in asserting (Br. 37-38) that a holding that the post of duty is the tax 'home' disqualifies every taxpayer for a deduction for travel expenses."

Respondent's assertion fails to show that petitioners' statement referred to a *literal* application of the doctrine that "home is synonymous with post of duty" would result in denial of the deduction to every taxpayer. Petitioners are not in error on this point. Applied in a literal sense a "post of duty" is anywhere a person happens to be working at a particular time. Ignoring for a moment the element of time, a person can never be away from home at work if where he works, which is his post of duty, is his home.

In order to salvage the doctrine from reaching the results indicated, it has been necessary to create the "temporary versus indefinite" concept which holds that a short lasting post of duty is not a "post of duty" hence is not taxpayers' home. Ergo, he is away from home. However, a longer lasting post of duty is a "post of duty" and is a "tax home". For tax purposes, taxpayer can never be "away from" this latter home under respondent's theory.

Respondent seeks to explain the absence of logical explanation for the existence of such an exception by saying (Resp. Brief, p. 23):

> ". . . The exception is ameliorative in nature, and is apparently based on the theory that it is inequitable to call the post of duty the tax 'home' if the taxpayer, being there only temporarily, is forced by economic circumstances to maintain a residence elsewhere."

In Reply to Certain Allegations on Page 19 of Respondent's Brief:

On page 19 of his brief respondent states:

> "Logis (*sic*) as well as authority requires the definition of 'home' which the Commissioner and the lower courts generally have adopted. Despite taxpayers' effort (Br. 17-32) to separate consideration of Section 23(a)(1)(A) of the 1939 Code from the omnibus disallowance of deductions for personal and living expenses in Section 24(a)(1) (Appendix, *infra*, p. 36), this Court has said specifically that the former section 'is to be contrasted with' the latter. (*Commissioner* v. *Flowers*, *supra*, at p. 469)."

Petitioners submit that their proposal that separate and independent consideration be given to the problems raised by Section 24(a)(1) and those raised by Section 23(a)(1)(A) does not conflict with the statement of this Court in the *Flowers* case that the two sections are to be contrasted. Instead, it accomplishes this purpose. It is respondent's theory that confuses the issue by attempting to solve the issues raised by both sections simultaneously. This cannot be done logically. Congress enacted two separate sections in the law and they logically require separate consideration in their proper order. Disposition of the issues raised by Section 24(a)(1) is a logical step which should precede consideration of the issues raised by Section 23(a)(1)(A). (Fully developed in Pet. Brief, p. 17).

In Reply to Certain Allegations on Page 20 of Respondent's Brief:

On page 20 of his brief, respondent states:

> ". . . It (Section 23(a)(1)(A)) is designed to extend relief to a taxpayer who in pursuit of his trade or business must travel temporarily or intermittently away from the locality which is his regular post of duty."

The statute itself provides the best rebuttal to this assertion. The statute does not require that the travel be temporary or intermittent nor does it require that it be away from his regular post of duty. The statute provides for the deduction of—

> "All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . .; traveling expenses (including the entire amount expended for meals and lodging) while away from home in pursuit of a trade or business."

In enumerating the three requirements in the *Flowers* case this Court did not require temporary employment as a condition of deductibility or specify that such employment must be away from a post of duty.

On page 20 of his brief respondent further states:

> ". . . Were a taxpayer's expenses for meals and lodging at the locality of his post of duty and in commuting to and from it held deductible, the legislative mandate in Section 24 would be frustrated."

Petitioners repeat that their position does not assert that commuting expenses are deductible. There is a well recognized distinction between commuting expenses and traveling expenses as is evidenced by the

fact that Section 23(a)(1)(A) permits the deduction of traveling expenses but does not permit the deduction of commuting expenses. Respondent seeks to (148 F. 2d 913 (4th Cir., 1945)) by determining the problem of deductibility of travel expenses under the principles applicable to commuting expenses. This is not proper.

The fallacy in respondent's position as above asserted is shown by the fact that expenses for meals and lodging at the locality of his "temporary" post of duty are admittedly deductible and this apparently does not "frustrate" the mandate of Section 24.

Respondent fails to grasp that an unnecessary expense resulting from the "personal choice" of a taxpayer who keeps his home distant from his employment for "personal reasons" is struck down by Section 24(a)(1) without the necessity of referring to Section 23(a)(1)(A) or invoking the doctrine that "home is synonymous with post of duty".

The assertion that taxpayers of the type here involved "chose" to keep their homes distant from their place of employment as a matter of personal choice is untrue. Taxpayers must incur double expenses by such travel which are not alleviated entirely by allowing them a tax deduction as respondent seems to feel. These men must absent themselves from their wives and children for extended periods while engaging in a hard and frequently hazardous occupation. This way of life is not the result of the "choice of" these petitioners. It is occasioned by the exigencies and needs of their trade. It is neither fair nor just

to increase the hardships upon a class of men who are performing a vital and essential function for a major industry of this country by depriving them of the benefits of a tax deduction to which they are legally entitled.

In Reply to Certain Allegations on Page 22 of Respondent's Brief:

On page 22 of his brief respondent states:

> "As demonstrated above, if the location of a taxpayer's family residence were generally determinative, every commuter would be entitled to the deduction."

This position of respondent has no justification. The statute specifically allows a deduction for traveling expenses. It does not do so for commuting expenses. The distinction between traveling expenses and commuting expenses is subject to ascertainment without any more difficulty than many other problems our courts deal with daily.

There are no words in the statute specifically granting a deduction for commuting expenses as contrasted with the situation in respect to traveling expenses which are specifically deductible. They have never been recognized as ordinary and necessary business expenses and there is neither statute nor case precedent to permit their deduction.

In Reply to Certain Allegations in Footnote on Page 22 of Respondent's Brief:

In footnote 15 on page 22 of his brief respondent states:

> "Taxpayers' suggestion (Br. 29) that commuting expenses are not 'personal' expenses within the

> meaning of Section 24(a)(1) is clearly refuted by *Commissioner* v. *Flowers, supra*, p. 473: 'Had his post of duty been in that city the cost of maintaining his home there and of commuting or driving to work concededly would be non-deductible living and personal expenses lacking the necessary direct relation to the prosecution of the business'."

Petitioners' position in respect to this seeming conflict in positions is stated as follows (Pet. Brief, p. 31):

> "Thus the classification of commuting expenses as 'personal' as above described is a legal conclusion that such expenses are nondeductible. As thus used, the term indiscriminately embraces those expenses which result from the 'choice of' or 'personal propensities of' the taxpayer and those which are deemed nondeductible under various legal concepts."

From the language quoted from the *Flowers* case it is manifest that this Court was applying the word "personal" in the sense that a *legal* conclusion such expenses were nondeductible. In this respect petitioners stated (Pet. Brief, p. 30):

> "A clearer understanding of the nature of commuting expenses would have resulted if such expenses had been described as 'nondeductible business expenses'. Such a description would not have obscured the element of choice of a taxpayer in incurring such expenses."

Thus, in this *factual* sense, commuting expenses are *not* incurred as a result of the "personal choice" of the taxpayer.

In Reply to Certain Allegations on Pages 25 and 26 of Respondent's Brief:

On page 25 of his brief respondent states:

> "To bring himself within the exception and prove that his employment is temporary, a taxpayer, according to the criteria applied by the Tax Court in numerous cases, must show not only that the employment period is actually short, but also that, prior to its commencement, it was anticipated to be short."

It is submitted that this statement alone reveals the fallacy in respondent's position. On page 13 of his brief respondent pays lip service to the requirements of deductibility *in Flowers* saying:

> "In *Commissioner* v. *Flowers,* 326 U. S. 465, this Court enumerated three basic requirements which must be satisfied before a traveling expense deduction may be allowed under Section 23(a)(1)(A) of the Internal Revenue Code of 1939 (Appendix, *infra,* p. 35). These requirements are (p. 470):
>
> (1) The expense must be reasonable and necessary traveling expense, as that term is generally understood. This includes such items as transportation fares and food and lodging expenses while traveling.
>
> (2) The expense must be incurred 'while away from home'.
>
> (3) The expense must be incurred in pursuit of business. This means that there must be a direct connection between the expenditure and the carrying on of the trade or business of the taxpayer or of his employer. Moreover, such an expenditure must be necessary or appropriate to the development and pursuit of the business or trade."

The requirements of deductibility established by respondent in the quotation above erect additional and entirely different standards of deductibility from those established by this Court. Such result could only come about by creating new rules of substantive law which are not sanctioned by this Court or found in the statutes.

On page 26 of his brief respondent refers to the described requirements he has set forth on page 25 of his brief, saying:

> "Accepting these legal criteria as controlling, the only question there is their application to particular."

It is submitted that this position of respondent *ignores* the controlling authority of *Commissioner* v. *Flowers* and erroneously assumes the validity of a set of legal requirements in addition to those specifically established by this Court.

In Reply to Certain Allegations on Page 27 of Respondent's Brief:

On page 27 of his brief respondent states:

> ". . . Since the decision turns upon a question of fact, this Court, under principles recently reaffirmed, need go no further than determine that the Court of Appeals has made a 'fair assessment' of the record."

As previously noted, petitioners submit that the Court of Appeals gave *no* consideration to the substantiality of the evidence. (See discussion herein in reply to allegations on pages 15 and 16 of respondent's brief).

In Reply to the Allegations on Pages 28-30 of Respondent's Brief:

On page 28 of his brief respondent states:

> "Taxpayers did not show that the actual duration of the jobs was short."

Neither the statute nor the *Flowers* case require compliance with the quoted statement as a condition of deductibility. The actual duration of the period of employment was stipulated to by the parties. No other evidence of the length of the employment period was necessary. What is a "short" period of time? There are many cases which have allowed the deduction for travel for periods longer than 8½ months. (See App. H, p. 14a of Pet. Brief). Further, is the basic necessity of the travel to be resolved on the sole issue of the length of the employment period? If so, what significance can be attached to all the other evidence bearing on the necessity of the travel? What implementation is to be made of the mandate of this Court that said (326 U.S. 470):

> "Whether particular expenditures fulfill these three requirements so as to entitle a taxpayer to a deduction is purely a question of fact in most instances."

On pages 28 to 30 respondent refers repeatedly to the fact that petitioners on several occasions voluntarily quit their jobs. He argues that such acts categorize the expenses as personal. The aspects of the original essentiality of the travel arise when the travel is *initiated,* not when it is *terminated.* The spuriousness of this argument is further revealed by respondent's argument that the period of employment should ripen into indefinite employment which will produce a forfeiture

of the deduction if taxpayer continues to work until job completion. Respondent's argument would produce such result irrespective of the degree of justification taxpayer would have for not moving his home to the job site (e.g., *James R. Whitaker,* 24 T.C. 750).

The constitutional law aspects for penalizing a taxpayer who quits his job by denying him a tax deduction to which he might otherwise be entitled have been fully developed in petitioner's brief. (Pet. Brief, p. 56).

It is submitted that the instant petitioners do *not* leave their homes as a matter of personal choice but do so out of the necessity of following their trades. In respect to petitioner Peurifoy, respondent stated (Resp. Br. p. 3):

> "... He actually resides there (his home) when he is employed in the vicinity of Wilmington and returns to this residence on week-ends if the place of employment is within a reasonable distance."

Why would Peurifoy return to his residence on week-ends if he worked elsewhere as a matter of personal choice? Why would he have left his home in the first place if his work did not require him to do so?

In Reply to Allegations on Pages 30-32 of Respondent's Brief:

On page 25 of his brief respondent states:

> "2. Taxpayers did not show that the jobs were anticipated to be of short duration"

Neither the statute nor the *Flowers* case requires compliance with the quoted statement as a condition of deductibility. In this respect the record produced ample evidence of the nature of the employments of the respective petitioners and the multitude of con-

struction projects on which they work. Absent some extraordinary factor, construction work, by its very nature is temporary. Upon completion of the construction work, both employers and employees alike must seek work elsewhere. Neither the Tax Court nor the Commissioner maintain that the home of the employer-contractor is at the construction site.

On page 21 of his brief he says: "A desire for equality among taxpayers is to be attributed to Congress, rather than the reverse." Where is the inequality? The employer-contractor knows he will be on the job from beginning to end. The craftsman's period of employment is subject to many hazards. Discharge, strikes, material shortages or the nature of his work may require termination of his employment long before the work is completed. However, it is the employee, whose period of employment away from home will average much shorter than that of his employer, who is being denied the deduction.

Such employees know for a certainty that their employment at a construction site will terminate in a relatively short period of time.

CONCLUSION

From the foregoing, petitioners respectfully submit that the position of the respondent is not valid and that the judgment of the Court of Appeals below should be reversed.

Respectfully submitted,

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No. 46

In the Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES, BETTY O. STINES, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY MEMORANDUM FOR THE RESPONDENT

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REPLY MEMORANDUM FOR THE RESPONDENT

1. *The Treasury's interpretation of "home" as used in Section 23 (a) (1) (A) has received implied congressional approval.*

As we sought to demonstrate in our main brief (pp. 16–21), it is well established that the statutory phrase "while away from home in the pursuit of a trade or business" generally has reference to a temporary business trip away from the taxpayer's post of duty—*i. e.*, the community where the taxpayer is principally assigned to work, and not the community where the taxpayer's residence is located (although usually the two will be the same). Thus, the traveling-expense provision is normally inapplicable to living expenses incurred at the taxpayer's post of duty. See *Com-*

missioner v. *Flowers*, 326 U. S. 465, 474.[1] In this connection, we pointed out (pp. 16–19) that ever since 1921, when the business traveling-expense provision was first enacted, numerous administrative rulings and Tax Court decisions have uniformly supported this interpretation; that all appellate decisions since this Court's decision in *Commissioner* v. *Flowers*, *supra*, have been to the same effect; and that under the circumstances "This interpretation, which is precisely the same as that given to identical traveling expense deductions authorized by prior and successive Revenue Acts, is deemed to possess implied legislative approval and to have the force of law." *Commissioner* v. *Flowers*, *supra*, at 469 (footnote omitted).

In answer, taxpayers (Reply Br. 4–6) belatedly rely on the pre-*Flowers* decision in *Wallace* v. *Commissioner*, 144 F. 2d 207 (C. A. 9), holding that one's residence is his tax "home."[2] Taxpayers (Reply Br. 5) concede that "Admittedly the *Wallace* decision has not been frequently followed," but they urge (*id.*, p. 6) that "Truth and right reason can never atrophy though frequently obscured for an unseemly long

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[1] Although not dealing directly with the meaning of "home," this Court there stated: "Travel expenses in pursuit of business within the meaning of Section 23 (a) (1) (A) could arise only when the [employer's] business forced the taxpayer to travel *and to live temporarily at some place other than Mobile* [the taxpayer's post of duty] * * *. Business trips are to be identified in relation to business demands *and the traveler's business headquarters*." (Emphasis added.)

[2] However, under taxpayers' view as to what constitutes "personal" expenditures under Section 24 (a) (1), the deduction claim involved in *Wallace* should have been disallowed, irrespective of the meaning of "home" in Section 23 (a) (1) (A). See taxpayers' main brief, pp. 25–32.

time." According to taxpayers, "the doctrine that 'home is synonymous with post of duty or indefinite post of duty' goes far beyond 'interpretation' of an act of Congress but seeks to erect a rule of law independent of and in conflict with the statutory enactment" (*id.*, p. 11).

Taxpayer's contention is in error for the reasons already stated. Indeed, not only is there no conflict with the statute, but the Treasury's definition of "home" was brought forcefully to the attention of Congress and was given explicit recognition through an amendment relating to a particular group of taxpayers—*i. e.*, members of Congress themselves. Prior to 1952, it was well established that members of Congress could not deduct, as business traveling expenses, the cost of meals and lodging while in Washington; the reason was that Washington is the principal post of duty of a member of Congress and hence, under the settled rule, is his tax "home," even though his family residence is located elsewhere in the district he represents. *George W. Lindsay*, 34 B. T. A 840. This decision was overturned by legislation in 1952 (the year before the tax year involved here), but the amendment was strictly limited to members of Congress and, moreover, to an amount not exceeding $3,000 per year. The amendment provided

> That for the two taxable years beginning after December 31, 1952, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered to be his home for the purposes of

> **Section 23 (a) (1) (A) of the Internal Revenue Code, but amounts expended by such Member within each such taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.**

Legislative Branch Appropriation Act, 66 Stat. 467 (*infra*, p. 9). A like provision was enacted in the Legislative-Judiciary Appropriation Act of 1954 (*infra*, pp. 9–10) and was made permanent in the Internal Revenue Code of 1954 (*infra*, pp. 10–11).

The enactment of this amendment convincingly demonstrates, we believe, congressional acceptance of the Treasury's definition of "home" with respect to all taxpayers except members of Congress. If Congress thought that *Wallace* were correct, it surely would have said so in a statute of general application; instead, it enacted a measure dealing only with members of Congress. And if Congress thought that *Wallace* were correct, there would be no reason at all for the $3,000 annual limitation; for in that event all such costs would be deductible. As the legislative history indicates, a special definition of "home" was thought appropriate for members of Congress because of the unique circumstances involved; but, because of vigorous opposition (especially in the Senate) to establishing a special rule for members of Congress, a restriction was imposed on how much could be deducted as a result of the change.[3]

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[3] The principal proponent of the amendment, Rep. McCormack, recognized the general rule that "home" as used in Section 23 (a) (1) (A) means "a taxpayer's place of business, station, or post of duty, and he is not in a travel status while he is located at his principal post of duty, even though he is

Taxpayers in the instant case seek from this Court a decision advising Congress, in effect, that its 1952 amendment was unnecessary—that indeed the 1952 amendment, because of the $3,000 limitation, actually *reduced* the tax benefits available to members of Congress, rather than increase such benefits as everyone had thought. Taxpayers, moreover, seek a decision conferring across-the-board tax benefits which Congress withheld. In the circumstances, if the *Wallace*

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away from his residence." 98 Cong. Rec. 5280. He argued, though, that the residence of a Member of Congress in the district he represents should be regarded as his tax "home" so as to place him on a par with a businessman who makes a business trip to Washington from his business headquarters located elsewhere. 98 Cong. Rec. 5280–5281. See also 98 Cong. Rec. 8276 (Senator Ellender). The proposal, after passage by the House, was approved by the Senate Appropriations Committee, but with a proviso limiting the deduction to $2,400 per year. Sen. Rep. No. 1828, 82d Cong., 2d Sess., p. 2. Even with this limitation, however, the proposal was widely criticized on the Senate floor as a measure granting Members of Congress a tax advantage not enjoyed by other taxpayers. 98 Cong. Rec. 8271–8292. See, *e. g.*, the statement of Senator Williams, 98 Cong. Rec. 8281 ("I think we should let Congressmen pay their expenses as other men do. When the Senator and I ran for office we knew that if elected we were coming to Washington"), and the statement of Senator Byrd, 98 Cong. Rec. 8282 ("Thus, at the present time, there is a uniform rule which applies for deducting traveling expenses, including expenses for meals and lodging, under section 23 (a) (1) (A) while away from home and in pursuit of a trade or business. The expense must be incurred away from the principal post of duty of the taxpayer. The McCormack amendment would reverse this uniform rule in the case of a Member of Congress.") The proposal was defeated in the Senate, 98 Cong. Rec. 8292, by the device of adopting a substitute measure on a wholly different subject. In conference, however, a compromise measure was adopted, restricting the effect of the provision to the two tax years beginning after December 31, 1952, but changing the dollar limitation to $3,000 per year. 98 Cong. Rec. 9555–9563.

definition of "home" is to be applied generally, that step, we submit, should be taken by Congress, not this Court.

2. *Taxpayers' expenses at Kinston, their only post of duty during the period involved, are not deductible apart from the Tax Court's exception as to temporary employment of short duration, and taxpayers have failed to bring themselves within the exception.*

As pointed out in our main brief (pp. 21–26), the Tax Court has engrafted on the general rule an exception relating to temporary employment of short duration. Where the exception applies, the taxpayer's temporary post of duty is disregarded and the taxpayer's residence is apparently treated as the tax "home." In order to come within the exception, however, it is necessary for the taxpayer to prove that the duration of the job not only was actually short but also was foreseeably short. The central issue in this case is whether taxpayers carried their burden of showing that their jobs at Kinston met these conditions.

In these circumstances, it is surprising, to say the least, that taxpayers repeatedly attack the validity of the exception. After citing the three basic standards of deductibility as stated in *Flowers,* taxpayers contend that "there can be no exceptions to the mandate of this Court if the matter in issue is within the orbit of its decision" (Reply Br. 4); that the conditions of deductibility under the exception "erect additional and entirely different standards of deductibility from those established by this Court" (*id.,* p. 19); and that the position of the Tax Court and the Commissioner "erroneously assumes the validity of a set of legal

requirements in addition to those specifically established by this Court" (*ibid.*).

But this contention is self-defeating. The exception in question operates *in favor* of these taxpayers and those similarly situated. The exception is ameliorative in nature and serves to extend the benefit of the deduction to those who would otherwise not qualify. Apart from the exception, it is clear that the Tax Court would have flatly rejected taxpayers' deduction claim; for, apart from the exception, taxpayers would fail to meet the three requirements stated in *Flowers*. As shown above, while at Kinston, they were not "away from home" within the generally accepted definition of "home." In addition, even assuming that their expenses at Kinston could fairly be regarded as "traveling" expenses, these expenses were not incurred while "in the pursuit of a trade or business" within the meaning of *Flowers*.[4]

Thus, by attacking the validity of the exception, taxpayers attack the very basis on which the Commissioner and the Tax Court allow construction

[4] 326 U. S. at 474: "Travel expenses in pursuit of business within the meaning of § 23 (a) (1) (A) could arise only when the railroad's [*i. e.*, employer's] business forced the taxpayer to travel and to live temporarily at some place other than Mobile [Flowers' post of duty], thereby advancing the interests of the railroad [employer]." When each of the taxpayers in the instant case traveled to Kinston, he was unemployed and was not sure of obtaining a job there; under usual standards, therefore, the travel was not "in the pursuit of a trade or business" (Section 23 (a) (1) (A)) or "in connection with the performance by him of services as an employee" (Section 22 (n) (2)). Compare *United States* v. *Woodall* (C. A. 10), decided May 6, 1958 (1958 C. C. H., par. 9547), certiorari denied, October 13, 1958, No. 159, this Term. See pp. 14–15, n. 2, of our main brief.

workers (and others) a deduction for "traveling expenses" incurred on jobs shown to meet the requirements of "temporary" employment.[5] In effect, these taxpayers want the benefit of the exception without meeting its conditions. And, by arguing that shortness of duration is immaterial to deductibility, taxpayers necessarily take the position that they are entitled to deduct their everyday living expenses even when they are on a job lasting for "several years" (Br. 22). Such preferential tax treatment, we submit, cannot be justified under Section 23 (a) (1) (A) as a deduction for "traveling expenses," particularly in the light of Section 24 (a) (1)'s prohibition against the deduction of 'personal, living, or family expenses."[6] See *Commissioner* v. *Flowers,* 326 U. S. at 469.

For these reasons, and for the reasons stated in our main brief, it is respectfully submitted that the judgment of the court below should be affirmed.

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Solicitor General.

CHARLES K. RICE,
Assistant Attorney General.

EARL E. POLLOCK,
Assistant to the Solicitor General.

OCTOBER 1958.

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[5] For example, in this very proceeding (R. 27), taxpayer Stines was allowed to deduct his expenses in connection with his 1953 employment at Charleston (3 weeks) and Fort Bragg (7½ weeks).

[6] As pointed out in our main brief (p. 24, n. 17), not even truly transient workers are permitted to deduct their living expenses while traveling. See, *e. g., Brassfield* v. *Commissioner,* 1952 P-H T. C. Memo. Dec., ¶ 52, 176, 52, 177.

APPENDIX

1. The Legislative Branch Appropriation Act, 1953, Pub. L. 471, 82d Cong., 2d Sess., July 9, 1952, provides in pertinent part (66 Stat. 464, 467):

HOUSE OF REPRESENTATIVES

SALARIES, MILEAGE, AND EXPENSES OF MEMBERS

For compensation of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, $5,492,500.

For mileage and expense allowance of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, as authorized by law, $1,273,500: *Provided*, That for the two taxable years beginning after December 31, 1952, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered to be his home for the purposes of section 23 (a) (1) (A) of the Internal Revenue Code, but amounts expended by such Member within each such taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

2. The Legislative-Judiciary Appropriation Act, 1954, Pub. L. 178, 83d Cong., 1st Sess., August 1, 1953, provides in pertinent part (67 Stat. 318, 322):

HOUSE OF REPRESENTATIVES

SALARIES, MILEAGE, AND EXPENSES OF MEMBERS

For compensation of Members of the House of Representatives, Delegates from Territories,

and the Resident Commissioner from Puerto Rico, $5,492,500.

For mileage and expense allowance of Members of the House of Representatives, Delegates from Territories, and the Resident Commissioner from Puerto Rico, as authorized by law, $1,273,500. The proviso under this head in Public Law 471, Eighty-second Congress, is amended to read as follows: "*Provided*, That in the case of taxable years beginning after December 31, 1953, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home for the purposes of section 23 (a) (1) (A) of the Internal Revenue Code, but amounts expended by such Member within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000."

3. Section 162 (a) of the Internal Revenue Code of 1954 provides:

§ 162. TRADE OR BUSINESS EXPENSES

(a) IN GENERAL.—There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including—

(1) a reasonable allowance for salaries or other compensation for personal services actually rendered;

(2) traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; and

(3) rentals or other payments required to be made as a condition to the continued use or possession, for purposes of the trade or business, of property to which the taxpayer has not

taken or is not taking title or in which he has no equity.

For purposes of the preceding sentence, the place of residence of a Member of Congress (including any Delegate and Resident Commissioner) within the State, congressional district, Territory, or possession which he represents in Congress shall be considered his home, but amounts expended by such Members within each taxable year for living expenses shall not be deductible for income tax purposes in excess of $3,000.

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No. 46

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

JAMES E. PEURIFOY, PAUL V. STINES and BETTY O. STINES, JOHN S. HALL and DORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY TO RESPONDENT'S REPLY MEMORANDUM

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REPLY TO RESPONDENT'S REPLY MEMORANDUM

ARGUMENT

I

IN REBUTTAL TO RESPONDENT'S POSITION THAT CONGRESS HAS GIVEN IMPLIED CONGRESSIONAL APPROVAL TO THE DOCTRINE THAT "HOME IS SYNONYMOUS WITH POST OF DUTY".

In his reply memorandum, respondent first argues that the doctrine that "home means post of duty" is valid because administrative rulings to that effect have supported this doctrine since enactment of the travel expense provision in 1921. Respondent then argues that such administrative interpretation has received implied legislative approval as evidenced by the statu-

tory provisions, shown in his appendix to said reply memorandum, pertaining to Congressmen which construes "home" for Congressmen, to be their residence.

A study of the legislative history of the travel deduction expense clause in Section 23(a)(1)(A) discloses beyond question that Congress originally enacted the provision with the intent that "home" be used in the statute in its ordinary meaning and that, as originally enacted, the statute was intended to permit Congressmen to deduct travel expenses while in Washington as Members of Congress.

The pertinent extracts from the Congressional Record in reference to Section 214 of the Revenue Act of 1921, which first enacted the travel expense deduction, are as follows:

From 61 Cong. Rec. 6672:

Mr. Walsh of Massachusetts.

". . . And for the first time there has been inserted these words—

'traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business'.

The department has already ruled that public servants away from home are in pursuit of a trade or business. So that provision of this bill will permit every Representative and Senator to deduct from his income all that he may pay for board and lodging while he is in attendance upon his duties in Washington."

From 61 Cong. Rec. 6673:

Mr. Walsh of Massachusetts.

"Mr. President, I wish to say that when the language to which I have referred was considered by the Committee it was discussed from the stand-

point of allowing the exemption to traveling salesmen. It was thought that their traveling expenses were a matter for proper deduction and that their meals and lodging should also be included in such deduction; but I have no doubt whatever that the department will so interpret the provision, for already in similar cases they have so interpreted it as to permit a Senator or a Representative while here in Washington attending his duties to an exemption for board and lodging. I am not discussing the merits of the question, whether it is wise or unwise; but the fact still remains that the language will permit a Representative or a Senator to charge off as an exemption the amount expended for board and lodging."

* * * * * *

Mr. Walsh of Massachusetts.

". . . I made inquiries and found out what the rulings of the department were, and I came to the conclusion that these deductions could be made by Representatives and Senators as well as by anybody else."

* * * * * *

Mr. Borah.

"I do not understand what the deduction is that may be made, and how it may be made, as the Senator claims, by Members of Congress."

Mr. Walsh of Massachusetts.

"Traveling expenses, including the entire amount expended for meals and lodging while away from home in the pursuit of a trade or business."

* * * * * *

Mr. Walsh of Massachusetts.

"Mr. President, I can not cite the decision, but I can state to the Senator that an expert in the department stated to me that the rulings of the deparment would permit a Senator or a Repre-

sentative to make the deductions I have mentioned."

From the above it is clear that the original intent of Congress was not to construe the word "home" as being synonymous with "post of duty."

A study of the legislative history pertinent to the special provision enacted for the benefit of Congressmen discloses that Congress did not affirm the doctrine that "home is synonymous with post of duty" in enacting such legislation. Conversely, Congress specifically and unequivocally renounced such interpretation and enacted the special provision for the sole purpose of overcoming the Tax Court's (Board of Tax Appeals) interpretation of "home being synonymous with post of duty" as applied to Congressmen in *George W. Lindsay*, 34 B.T.A. 840 (1936).

The statutory provisions set forth in the respondent's appendix to his reply memorandum do not confer implied legislative approval on the doctrine that "home is synonymous with post of duty." Conversely, such statutes reject the doctrine. The intent of Congress is disclosed in the following extracts taken from the Congressional Record pertaining to the legislation referred to by respondent:

From 98 Cong. Rec. 5280-5281:

Mr. McCormak.

"The purpose of the amendment is to insure that Members of Congress are treated for Federal income tax purposes comparably with other taxpayers similarly situated."

* * * * * *

"Section 23(a)(1)(A) of the Internal Revenue Code allows to all taxpayers as deductions from

gross income traveling expense—including the entire amount expended for meals and lodging—while away from home in the pursuit of a trade or business. Such a provision was first inserted in the Revenue Act of 1921."

* * * * * * *

"Tax administrators and judges have had difficulty in arriving at a definition of the term "home" and in applying the language to specific cases."

At this point a discussion follows of certain administrative rulings which have interpreted "home as being synonymous with post of duty."

Mr. McCormak.

"Now let us see how these rules have been applied to Members of Congress. The Tax Court has held that the home of a Member of Congress for tax purposes is the District of Columbia, on the theory that this is the business location, post or station of Members of Congress. On this reasoning—*which is judicial legislation if I have even (sic) seen it*—the expenses of a Member of Congress while attending a session of Congress were held not to be deductible—see *George W. Lindsay*, (34 B.T.A. 840 (1936))." (Emphasis added).

* * * * * * *

"Members of Congress are certainly not entitled to any better treatment under the income-tax laws than is accorded other taxpayers. Neither should they be an object of discrimination under the tax law."

* * * * * * *

"In all fairness, however, Members of Congress should not be expected to absorb without deduction for tax purposes business expenses which would be deductible to other taxpayers similarly situated."

From 99 Cong. Rec. 7003-7004:

Mr. McCormak.

"This amendment simply gives to *Members of Congress that which every other person in the country has; a determination legally that our home, where we live, is our place of residence for tax-paying purposes, instead of its being the District of Columbia.* It gives us the right to deduct business expenses—that is all—in connection with the performance of our duties as Members of Congress. This is the same right that any other business man has, and which he should have." (Emphasis added).

* * * * * *

"The purpose and the effect of this amendment is to give to Members of Congress under the tax laws the same privileges everybody else has."

From 99 Cong. Rec. (App.) A5098:

Mr. Fisher.

"Section 23(a)(1)(A), referred to in the amendment, allows to all taxpayers as deductions from gross income, traveling expenses, including the amount expended for meals and lodging—while away from home in the pursuit of a trade or business. This has been the law since 1921.

"But the Commissioner of Internal Revenue has had difficulty in interpreting the location of a taxpayer's home . . ."

* * * * * *

"It has been pointed out that lobbyists—or a business or professional man—may make such deductions while living in Washington but that Congressmen could not. And it was in attempt to remove that discrination that this legislation was inspired."

* * * * * *

> ". . . It was proposed to allow Congressmen the same identical deduction privileges that are—and for 30 years have been—allowed to lobbyists, business or professional men and other taxpayers who have occasion to come to Washington, or go elsewhere away from home, on legitimate business missions."

From the above it is apparent that Congress has never affirmed the doctrine that "home is synonymous with post of duty" but has clearly rejected such interpretation of Section 23(a)(1)(A).

Respondent's interpretation would place Congress in the position of seeking preferential legislation for itself. However, the legislative history shows that Congress was seeking to avoid discrimination against Members of Congress, not create legislation discriminating in their favor.

II

IN REBUTTAL TO RESPONDENT'S POSITION THAT PETITIONERS HAVE FAILED TO BRING THEMSELVES WITHIN THE "EXCEPTION", VIZ., THAT THE EMPLOYMENT WAS TEMPORARY.

This position of the respondent has been previously advanced in his brief. (Resp. Brief, pp. 15-16). As developed in petitioner's reply brief (pp. 7-8), petitioners again submit that *no* evaluation of the evidence was made by the Court of Appeals below. The evidence in this proceeding fully substantiates the factual determination of the Tax Court that the expenses in question were not personal and that the employments were in fact temporary.

It is firmly established that factual determinations of a trial court should not be upset by appellate action unless such determination is clearly erroneous. (Rule 52 (a) F.R.C.P.) It is submitted that there is

abundant evidence to support the findings of the trial court and that such findings are correct. (Pet. Br., pp. 6-12).

CONCLUSION

In consideration of the above, it is respectfully submitted that the decision of the Court of Appeals below should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 46

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY OF PETITIONERS TO AUTHORITY FILED AFTER ORAL ARGUMENT

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IN THE

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY OF PETITIONERS TO AUTHORITY FILED AFTER ORAL ARGUMENT

FACTS

Under date of October 23, 1958, respondent filed a copy of the opinion of the decision of United States Court of Appeals for the Eighth Circuit rendered in

the case of *Commissioner of Internal Revenue* v. *Peter F. Janss* under date of October 20, 1958. Oral argument on the instant case was concluded before this Court on October 20, 1958.

ARGUMENT

In its consideration of the facts in the case of *Peter F. Janss*, P-H Mem. T.C. Dec., Par. 57,084, the Tax Court equated the facts in *Janss* decision with the facts in its decision of the *Peurifoy* case here involved (Pet. Br., p. 13a).

A careful consideration of the two cases discloses that there are fundamental differences in the two respective fact situations:

(a) *Janss* voluntarily sought work away from home because of the opportunity for larger pay. Petitioners herein were referred to work away from home by the Union when no work was available near their homes (Pet. Br., p. 7).

(b) *Janss* procured his work by personal solicitation seeking work of his own choosing. Petitioners herein were sent to available work sites by Union referral (Resp. Br., pp. 2, 3).

(c) *Janss* took a position that could have been filled from local labor supply. Union referrals come from requests of other jurisdictions to supply workers not locally available (Resp. Br., p. 3).

The opinion of the Court of Appeals in the *Janss* decision recognized these basic factual differences in the respective situations saying (p. 5):

> " . . . The *Schurer* and *Leach* decisions may likewise be distinguished, the former because it was prior to the *Flowers* decision and *both because of*

the needs of the trade or business." (Emphasis added).

The findings of fact in the case of *Harry F. Schurer*, 3 T.C. 544, are as follows:

> "Petitioner has always carried on his trade as plumber at Pittsburgh, Pennsylvania. He is registered as such under an ordinance of Pittsburgh and is required to register each year. He has always looked to his local union for employment. In December, 1940 he was requested by his local union to go to Indiantown Gap, Pennsylvania, which is 22 miles from Harrisburg to work on a soldier's cantonment. He worked there three weeks in 1940 and four weeks in 1941. In 1941 he spent $80.00 for meals and lodging while employed at Indiantown Gap and $5.12 for train fare back to Pittsburgh. Shortly thereafter he accepted employment through his union in the construction of a cantonment at Aberdeen, Maryland. He worked there nine weeks, spending $180.00 for meals and lodging and $12.34 for transportation from Pittsburgh to Aberdeen and return.
>
> "Shortly thereafter he was requested to go to Morgantown, West Virginia, to assist in the construction of an Ammonia plant for the duPont Co. He was there for a period of 33 weeks, after which he returned to Pittsburgh. His expenses at Morgantown were $660.00 for room and board and $3.80 for bus fare from Pittsburgh to Morgantown."

In the *Schurer* case the Commissioner disallowed the travel expenses for the identical reason he disallowed the expenses in the instant cases. The Tax Court held the expenses to be properly deductible in that case and the Court of Appeals for The Eighth Circuit in its *Jauss* decision held that the expenses of *Schurer*

were properly deductible. The facts in the instant cases and the facts in the *Schurer* case are strikingly identical as shown by the above quotation.

The case of *E. G. Leach,* 12 T.C. 20, is very similar to that of *Schurer.* The following are the findings of fact from the opinion (12 T.C. 21):

> "The husband was employed during all of the year 1945 by a construction company to erect structural steel. He had no station or regular place of employment during 1945. His employment required him to be away from Florence for 49 weeks during 1945 and to be for short periods, varying, from a few weeks to several months, at various places so remote from Florence that he had to rent lodging for himself at each place. He could not move his wife and child to those places because of the shortness and indefiniteness of the duration of each job and the unavailability of accommodations."
>
> "The cost of lodgings for himself while away from home in pursuit of his trade or business during 1945 was $564.00. That amount was an ordinary and necessary expense of his trade in 1945."

The Eighth Circuit reached its decision in the *Janss* case on the basis that the facts did not support a finding that requirement three of the *Flowers* case (*Commissioner* v. *Flowers,* 326 U.S. 465) had been met, saying (p. 6):

> "Clearly, the facts in the instant case require a finding that the third condition set forth by the Supreme Court in the Flowers case has not been met."

This was clearly a proper application of the pertinent principles of law.

In the instant proceeding, respondent conceded in his oral argument that petitioners have met requirement three of the *Flowers* case. Such position of respondent is in accord with the facts, is in accord with the principles of law set forth by the Supreme Court in the *Flowers* case, and is in accord with the *Leach* and *Schurer* decisions of the Tax Court which were endorsed by the Circuit Court of Appeals for the Eighth Circuit in the *Janss* decision.

In its opinion below the United States Court of Appeals for the Fourth Circuit did not make an evaluation of the facts as required by *Flowers* and apply such evaluation to the three requirements of the *Flowers* case. The Court of Appeals below based its decision on the principle of substantive law that "home is synonymous with an indefinite post of duty". It is also to be noted that the *Leach* case *allowed* the deduction after determining the work was "indefinite".

It is to be further noted that the Court of Appeals for the Eighth Circuit *did not endorse* the opinion of the Court of Appeals for the Fourth Circuit. Conversely, it took exception to such opinion. After quoting at length from the *Peurifoy* decision in the Fourth Circuit, the Court of Appeals for the Eighth Circuit said (p. 5):

> "The 'exception to the rule' of the *Commissioner* v. *Flowers* case and referred to above does *not seem to us to be supported by the cases cited therefor.*" (Emphasis added).

It is also apparent that the Eighth Circuit *did not subscribe* to the concept of there being an "exception" to the *Flowers* decision as evidenced by its putting

the phrase 'exception to the rule' in quotes. The Eighth Circuit avoided this pitfall by properly making an evaluation of the *facts* against the three requirements of *Flowers*.

Petitioners submit that the Tax Court reached its decision in the *Janss* case by erroneously treating the doctrine that "home is synonymous with a place of indefinite employment but is not synonymous with a place of temporary employment" as a rule of substantive law.

Petitioner *Janss* was obviously engaged in "temporary" employment. The practice of the Tax Court of concluding that temporary employment gives rise to deductible expense as a matter of law worked in reverse in the *Janss* case. In *Janss* this doctrine *created* the deduction. Conventionally, the label of "non temporary" produces a denial of the deduction. The established practice of the Tax Court of ignoring the three requirements of the *Flowers* case left the Court without means of properly disqualifying the deduction. In this respect, petitioners in their brief said (Pet. Br., p. 27):

> "A decision on this point to the effect that the expenses in question are not 'personal' does *not* determine their deductibility under Section 23(a)(1)(A). This latter question logically is brought to account against the three requirements of *Commissioner* v. *Flowers*."

The function of bringing the matter to account against the three requirements in the *Flowers* case is exactly the function performed (and properly so) by the Eighth Circuit in its *Janss* decision. The decision of the Court of Appeals in the *Janss* case also illustrates that the safeguards erected in the statute, when

properly applied, are fully adequate to strike down unwarranted claims for travel expense deductions. The decision also illustrates that the claim made by respondent that the doctrine that "home is synonymous with post of duty or indefinite post of duty" is necessary to prevent abuse of the travel expense deduction is not justified.

CONCLUSION

The Eighth Circuit in the *Janss* decision said that the *Leach* and *Schurer* decisions were properly decided. The facts in those two cases are almost an exact parallel to the facts in the instant cases. It is respectfully submitted that the decision of the United States Court of Appeals for the Eighth Circuit rendered in the case of *Commissioner of Internal Revenue* v. *Peter F. Janss* under date of October 20, 1958 is in accord with the principles of law advocated by petitioners in their briefs herein filed in this proceeding.

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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 16

JAMES E. PEDDICORD, PAUL V. S[illegible] and [illegible] O. SIMES, JOHN S. HAY and DORIS D. [illegible],

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 46

JAMES E. PEURIFOY, PAUL V. STINES AND BETTY O. STINES, JOHN S. HALL AND DORIS D. HALL,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, *Respondent.*

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

PETITION FOR REHEARING

Petitioners respectfully pray this Court to grant rehearing of its decision rendered in this proceeding under date of November 10, 1958.

As reasons for granting rehearing, petitioners respectfully show as follows:

I

The decision of this Court was rendered on the basis of the principle of law that this Court will not further review a factual matter that has once been reviewed

by an appellate Court which has made a "fair assessment of the record". In this respect this Court said (p. 2):

> "Resolution of this case as presented to us turns, therefore, upon a narrow question of fact—Was the petitioners' employment 'temporary' or 'indefinite'?"

This position *assumes* that temporary employment is a valid requirement for deductibility. This is a naked question of law which has never been answered by this Court. The words "temporary" and "indefinite" do not appear in the statute. The essentiality of temporary employment as a condition of deductibility must first be established before the necessity arises for petitioners to show facts to prove their employments were temporary.

The matter of determining whether or not an employment is "temporary" or "indefinite" relates solely to the question raised by requirement two of *Commissioner* v. *Flowers*, 326 U.S. 465, which states that "the expense must be incurred 'while away from home'". This requires a determination of whether or not the word "home" as used in the statute means a "place of indefinite employment but does not mean a place of temporary employment." This is purely a question of law.

It is therefore respectfully submitted that a question of pure law has been presented to this Court which logically and rightly requires a determination of its validity. This question is whether or not temporary employment is a fourth requirement for deductibility of travel expenses. This question must properly be

answered before there can arise a need for the petitioners to show facts to prove they have met such requirement.

II

In its opinion the Court refers to the manner in which the case was presented to the Court, saying (p. 2):

> "However, as the case has been presented to us we have found it inappropriate to consider such questions."

In his brief, respondent stated (p. 10):

> ". . . In the Commissioner's view the taxpayers here are not entitled to the deduction claimed as travel expenses because they were not incurred while 'away from home'."

Since the stipulated facts show the petitioners were away from "home" as that word is ordinarily understood, and since respondent bottomed his entire case on his interpretation of the word "home", it is respectfully submitted that this question of law is squarely presented to this Court in this proceeding.

III

It is also submitted that this Court has subordinated itself to the Tax Court in this decision. In this respect this Court said (p. 2):

> To this rule, however, The Tax Court has engrafted an exception . . ."

The rule referred to is rule three of the *Flowers* case rendered by this Court. The "exception" referred to

is one "engrafted" on a Supreme Court rule by the Tax Court. An "exception" to a rule of law changes and overrides the underlying rule to which it constitutes an exception. By doing so, it creates a new rule of substantive law. This is equivalent to saying that the "exception" engrafted by the Tax Court is paramount to the basic rule of the Supreme Court. This places the decisions of the Tax Court above those of the Supreme Court. By sanctioning such act, this Court subordinates itself to the Tax Court.

There was *no* factual determination by the Court of Appeals that requirement three relating to the "exigencies of the business" was not met. Respondent conceded that requirement three had been met.

As shown in the quotation set forth in Paragraph I above the allegations of a factual determination made by the Court of Appeals below related solely to the question of "temporary versus indefinite" employment. This is a matter falling exclusively under requirement two of the *Flowers* case.

The "exception" which the Tax Court has "engrafted" is not an exception to requirement three but an exception relating to requirement two of the *Flowers* case relating to the meaning of "home". The exception is its rule "that a place of temporary employment is not a tax home". This returns the problem to the meaning of the word "home". This is purely a question of substantive law.

By recognizing the existence of an "exception" to the mandates of this Court as developed in the *Flowers* case when no such exceptions exist, this Court is, in effect, admitting in this decision that it is not the su-

preme law of the land. This matter is clearly within the scope of the *Flowers* decision. Logically, there can be no "exceptions" to its mandates. The question is simply whether or not the three requirements of *Flowers* have been met. Respondent's case rests entirely on the meaning of the word "home". As defined under the "temporary versus indefinite" approach, the so-called exception of "temporary" employment has become a fourth requirement of deductibility when this Court has said in *Flowers* there are three.

CONCLUSION

This country needs a decision on this vital question of law. The "difficulty and litigation" engendered by this problem noted in the *Flowers* case continues unabated and with increased intensity since that decision. Theoretically the right of this Court to decide this question is beyond dispute. If this opinion stands, there is no way the question can ever be presented to this Court. The device of vaulting a rule of law by focusing attention on the evidence to sustain the application of such rule can then be used to prevent review of the rule of law itself.

If this device is valid in this case, it is valid for other cases. In theory this could divest this Court of much, if not most, of its appellate jurisdiction. Counsel, of course, recognizes that this will not happen. However, the theory of this decision would produce such result.

This decision sanctions and condones a long continued practice of misinterpretation and misapplication of the rules of law announced in the *Flowers* case. It recognizes the judicial existence of an "exception"

to its own mandates which as a matter of jurisprudence cannot exist. It improperly puts the Congress of The United States in the embarrassing position of selfishly securing a travel deduction for itself while turning its back on the rest of the country.

For the reasons set forth above it is respectfully urged that rehearing be granted.

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I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 of the rules of this Court.

DANIEL R. DIXON
Counsel for petitioners

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1958.

James E. Peurifoy, Paul V. Stines, Betty O. Stines, et al., Petitioners. v. Commissioner of Internal Revenue.	On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

[November 10, 1958.]

Per Curiam.

The petitioners were employed as construction workers at a site in Kinston, North Carolina, for continuous periods of 20½ months, 12½ months, and 8½ months, respectively, ending in the year 1953. Each of the petitioners maintained a permanent residence elsewhere in North Carolina. In reporting his adjusted gross income for 1953 each petitioner deducted amounts expended for board and lodging at Kinston during the period of employment there, and for transportation from Kinston to his permanent residence upon leaving that employment. These deductions were disallowed by the respondent. Ensuing Tax Court proceedings resulted in a decision in favor of the petitioners. 27 T. C. 149. The Court of Appeals reversed. 254 F. 2d 483. We granted certiorari, 356 U. S. 956, to consider certain questions as to the application of § 23 (a)(1)(A) of the Internal Revenue Code of 1939 * raised by the course of decisions

* "§ 23. Deductions from gross income.

"In computing net income there shall be allowed as deductions:

"(a) Expenses.

"(1) Trade or business expenses.

"(A) In general.

"All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business, including . . . traveling expenses (including the entire amount expended for meals and lodging) while away from home in the pursuit of a trade or business; . . . ." (26 U. S. C. (1952 ed.) § 23 (a)(1)(A).)

in the lower courts since our decision in *Commissioner* v. *Flowers*, 326 U. S. 465. However, as the case has been presented to us we have found it inappropriate to consider such questions.

The issue is whether the amounts in question constituted allowable deductions under § 23 (a)(1)(A). Generally, a taxpayer is entitled to deduct unreimbursed travel expenses under this subsection only when they are required by "the exigencies of business." *Commissioner* v. *Flowers*, *supra*. Application of this general rule would require affirmance of the judgment of the Court of Appeals in the present case.

To this rule, however, the Tax Court has engrafted an exception which allows a deduction for expenditures of the type made in this case when the taxpayer's employment is "temporary" as contrasted with "indefinite" or "indeterminate." Compare *Schurer* v. *Commissioner*, 3 T. C. 544; *Leach* v. *Commissioner*, 12 T. C. 20; *Albert* v. *Commissioner*, 13 T. C. 129, with *Warren* v. *Commissioner*, 13 T. C. 205; *Whitaker* v. *Commissioner*, 24 T. C. 750. The respondent does not in the present case challenge the validity of this exception to the general rule.

Resolution of this case as presented to us turns, therefore, upon a narrow question of fact—Was the petitioners' employment "temporary" or "indefinite"? The Tax Court, stating that "each case must be decided upon the basis of its own facts and circumstances," 29 T. C. 157, found that their employment was temporary. The Court of Appeals, also recognizing that the question was "one of fact," held that on the record the Tax Court's finding of temporary employment was "clearly erroneous." 254 F. 2d, at 487.

In reviewing the Tax Court's factual determination, the Court of Appeals has made a fair assessment of the record. 26 U. S. C. (Supp. 1952 ed.) § 7482; Rule 52 (A).

Fed. Rules Civ Proc; cf. *Universal Camera Corp.* v. *Labor Board*, 340 U. S. 474. That being so, this Court will not intervene. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U. S. 396, 400–401; *Labor Board* v. *Pittsburgh S. S. Co.*, 340 U. S. 498, 502–503.

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 46.—October Term, 1958.

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Mr. Justice Douglas, with whom Mr Justice Black and Mr. Justice Whittaker concur, dissenting.

As *Flowers* v. *Commissioner of Internal Revenue* [1] indicated, the prerequisites to a deduction for travel expenses under § 23 (a)(1)(A)[2] are threefold: The expenses must be reasonable and necessary,[3] they must be incurred while "away from home," and there must be a "direct connection between the expenditure and the carrying on of the trade or business *of the taxpayer or his employer*." I think the taxpayers in this case have met those conditions and should be allowed the claimed deductions.

The meaning of "home" was expresly left undecided in *Flowers* but is squarely presented in the instant case.[4]

[1] 326 U. S. 465.

[2] § 162 (a)(2) of the 1954 Internal Revenue Code.

[3] There is no contention made that the expenses here were not reasonable and necessary.

[4] The Court's opinion does not reach this question because it decides the case on a ground not raised by the respondent. See note 6, *infra*. Instead it affirms the Court of Appeals decision as relying on a factual determination. The Court of Appeals reversed the Tax Court because it thought the latter tribunal had unwarrantedly extended the "exception" to the *Flowers* case for expenses while "temporarily" away from home. Both courts agreed that taxpayers were away from their actual homes, but the Court of Appeals thought the absence of such duration precluded a deduction. Nowhere in the statute or in *Flowers* is a distinction made between "tem-

I disagree with the Commissioner's contention that "home" is synonymous with the situs of the employer's business. Such a construction means that the taxpayer who is forced to travel from place to place to pursue his trade must carry his home on his back regardless of the fact that he maintains his family at an abode which meets all accepted definitions of "home." I do not believe that Congress intended such a harsh result when it provided a deduction for traveling expenses. These construction workers do not have a permanent locus of employment as does the merchant or factory worker. They are required to travel from job to job in order to practice their trade. It would be an intolerable burden for them to uproot their families whenever they change jobs, if those jobs happen to take them to a different locality. When they do not undertake this burden they are living "away from home" [5] for the duration of the term of the jobs.[6]

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porary" and "indefinite" absences from home, and in fact such a distinction improperly emphasizes duration of the absence as the determinative factor in deciding where the taxpayer's "home" actually is.

[5] This definition of "home" will not permit any taxpayer who lives apart from his family to deduct his maintenance expenses, no matter what the nature of his trade or his employer's business. If the expenses are necessary and appropriate to neither the employer's business nor the employee's trade they are personal expenses under § 24 (a)(1) (§ 262 of the 1954 Internal Revenue Code). And of course the facts may show that a taxpayer has in fact abandoned his original "home" as his principal place of residence.

[6] The *Flowers* case does not hold, as the Court suggests, that the deduction is necessarily unavailable if not required by the exigencies of the *employer's* business. In that case a traveling expense deduction was denied a lawyer employed by a railroad who chose to maintain his home in Jackson, Mississippi, although, as the Court found, the permanent place of his business was in Mobile, Alabama. The Court held the expenses of traveling between Jackson and Mobile were not appropriate or necessary to the railroad's business. In the present case, however, the expenses incurred were necessary, not to the business

We have, then, not a question of fact which should be resolved below rather than here. We have a mixed question of law and fact. The facts will turn largely on the resolution of the question of law. The error below was mainly in assuming (albeit silently) a narrow construction of the statutory term "home."

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of the contractor for whom the taxpayers worked, but for the taxpayers themselves in order to carry on their chosen trade. *Flowers* did not decide that, because expenses are not required by the employer's business, they can never be justified as necessary to the employee's trade. The Government does not here contend that the expenses were nondeductible because inappropriate to the trade or business of the employer, the ground of decision in *Flowers*. Such a contention was not assigned as a reason for disallowance of the deduction nor presented to the courts below.